Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RONALD L. HARTMAN, KATHERINA H. HARTMAN, Individually and as Next Friend to JEFFERY ALAN HARTMAN and ANGELA MARIE HARTMAN, Both Minors; and LAURA JENKINS, Individually and as Representative of the Estate of Eddie Jenkins, Deceased; PEGGY SANDS, Individually and as Representative of the Estate of Martin Sands; EMILE ANNIBOLLI; EARL THOMPSON and JUDY L. THOMPSON; VERDA WILSON, Individually and as Representative of the Estate of ISAIAH WILSON, JR., Deceased,

Petitioners,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY; DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T H AGRICULTURE & NUTRITION COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1984-5, Judge Jack B. Weinstein of the Eastern District of New York approved a class action settlement involving service-persons injured by exposure to the herbicide Agent Orange in Vietnam. At the time of such settlement the plaintiffs in this case who had also served in Vietnam and been exposed to Agent Orange, had absolutely no manifestation, and were completely unaware, of any injury due to such exposure ("future claimants"). These future claimants, subsequent to manifesting Agent Orange-related injuries several years later, filed the present suit in the Texas state court. The suit, based solely upon state-law negligence, product liability, personal injury and wrongful death, was brought against seven chemical companies, one of which was an in-state defendant. Without any legitimate basis for original federal jurisdiction, the defendants removed the case to federal court and successfully urged the Judicial Panel on Multi-District Litigation to quickly transfer the case to Judge Weinstein's court in Brooklyn. Judge Weinstein denied plaintiffs

motion to remand and dismissed the case on res judicata grounds. The Second Circuit Court of Appeals affirmed the denial of remand on the sole ground that the Yonkers doctrine – a rule crafted by the Second Circuit which enables the federal courts to utilize the All Writs Act as a basis for the removal of otherwise unremovable cases – justified the removal of this case. The Second Circuit affirmed the dismissal by holding – in complete disregard of the class action collateral attack doctrine and the uncontradicted evidence of inadequate notice, inadequate representation, absence of right to opt out and other due process violations – that the claims of the future claimants were negotiated away and abolished by the unilateral action of the then presently injured class representatives in the 1984 class action settlement.

The judgment below presents the following important questions:

1. Whether the Yonkers doctrine – which permits federal judges to circumvent the removal statutes simply by invoking the All Writs Act "to

remove an otherwise unremovable state court case", in the discretion of the judge, "when the need arises" – can ever constitute a valid basis for removal.

2. Whether, even if the Yonkers doctrine is viable in some situations, it can constitutionally and/or properly be applied to absentee future claimants who have the absolute right, in a subsequent proceeding, to collaterally attack – on grounds of inadequate notice, inadequate representation, absence of an opt out opportunity and other due process violations – the class action consent decree upon which the application of the Yonkers doctrine is sought to be based?

3. Whether, even if the Yonkers doctrine is viable in some situations, it can ever be applied to authorize removal where the removing defendants did not clearly show, in their removal papers, that there was "no possibility" that the state court could find that the absentee future claimants did not receive, in the class action proceedings made the basis of the application of

the Yonkers doctrine, adequate notice, adequate representation, the opportunity to opt out or other due process violations?

4. Whether, as the Second Circuit held below, already injured named plaintiffs in Rule 23(b)(3) class actions are free, despite the Due Process Clause, to negotiate away the unaccrued future legal claims of absent persons without any notice, without any right to opt out, and without separate class representation, on the ground that such protections are not essential for "unknown plaintiffs," because "providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good"?

5. Whether a Rule 23(b)(3) class action settlement can ever constitute complete res judicata, thus justifying summary dismissal of a subsequent action by absentee future claimants, where the defendants have not conclusively negated such potential fact issues as inadequate notice, inadequate representation, absence of the opportunity to opt out and other due process violations?

All of these questions are worthy of certiorari intervention. As to most of them, there are conflicts among the federal court decisions which need resolving. The Yonkers doctrine, dealing as it does with unprecedented non-legislative expansion of federal judicial jurisdiction and power, urgently needs the attention of this Court. The evolving area of law dealing with class actions involving future claimants – which are mushrooming around the nation – is also in urgent need of this Court's attention.

INTERESTED PARTIES

RONALD L. HARTMAN, KATHERINA H. HARTMAN, Individually and as Next Friend to JEFFERY ALAN HARTMAN ANGELA MARIE HARTMAN, Both minors

Petitioners

LAURA JENKINS,
Individually and as Representative of Eddie Jenkins, Deceased

Petitioner

PEGGY SANDS, Individually and as Representative of the Estate of Martin Sands

Petitioner

EMILE ANNIBOLLI

Petitioner

EARL THOMPSON and JUDY L. THOMPSON

Petitioners

VERDA WILSON Individually and as Representative of the Estate of ISAIAH WILSON, JR., Deceased

Petitioner

DIAMOND SHAMROCK CHEMICALS COMPANY

Respondent

DOW CHEMICAL COMPANY

Respondent

MONSANTO COMPANY

Respondent

UNIROYAL, INC.

Respondent

HERCULES, INC.

Respondent

THOMPSON-HAYWARD CHEMICAL COMPANY

Respondent

T H AGRICULTURE & NUTRITION COMPANY, INC.

Respondent

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which affirmed both the district court's refusal to remand the case to state court and its dismissal of petitioners' claims, is reported at 996 F.2d 1425, and is reprinted as Appendix A, at A1 (page references to the appendices bound with both the Ivy petition and the Hartman petition are styled "A___"). The decision and order of the United States District Court for the Eastern District of New York, 781 F. Supp. 902, is reprinted as Appendix B at A26.

JURISDICTION

The decision of the court of appeals issued on June 24, 1993. A timely petition for rehearing and suggestion for rehearing en banc was denied with respect to the petitioners in this case on September 16, 1993. See Appendix G, at A72. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law."

28 U.S.C. § 1441 provides in relevant part:

> **"§ 1441. Actions removable generally**
>
> (a) [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

The All Writs Act, codified at 28 U.S.C. § 1651(a), is reprinted as Appendix L, at A148. Fed. R. Civ P. 23 is reprinted as Appendix E, at A64.

STATEMENT OF THE CASE

A. Statement Concerning Related Cases

Though not mentioned in the Petition for Writ of Certiorari recently filed in Ivy v. Diamond Shamrock, No. 93-860 ("Ivy Petition"), there were two separate sets of plaintiffs involved in the proceedings below. The first set includes those named as petitioners in the Ivy

Petition and the second set includes those named in this Petition ("Hartman Petition"). The Hartman plaintiffs include the Hartmans and six of the plaintiffs named in the Ivy petition. The defendants, causes of action, procedural history, rulings of the courts below and the essential issues on appeal are the same for both sets of plaintiffs. Because of the similarities between these two related cases, and in order to simplify the consideration of both by the Court, we have liberally utilized substantial portions of the Ivy Petition. We have advised Mr. Ken Cheseboro, one of the counsel for petitioners in Ivy, of our intention in this regard. We have been advised that the Hartman petitioners are permitted to utilize the Appendices to the Ivy Petition, which we will do. There are additional documents from the record that are relevant to the Hartman Petition and they are contained in what will be hereinafter referred to as the "Hartman Appendices" and, for simplicity, we have

commenced numbering the Hartman Appendices at p.72, in sequence from the Ivy Appendices.[1]

B. General Statement.

The decision below is the third in a line of cases from the Second Circuit, beginning in 1988, that embrace a radical new removal doctrine – and the first squarely to present the issue to

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[1] The Court should know that the undersigned counsel ("Musslewhite"), as one of the nine members of the Agent Orange Plaintiffs Management Committee ("AOPMC") in the original Agent Orange class action, gave his approval of the May 7, 1984 tentative settlement on the assurance that a claims process (there was great uncertainty about the number of claims at that time) would be completed and a distribution plan formulated prior to the fairness hearings being conducted and prior to any decision by Judge Weinstein as to whether to approve the settlement. However, Judge Weinstein did the opposite. He scheduled the fairness hearings in August, 1984, see 597 F. Supp. 740, 764 (E.D.N.Y. 1984); approved the settlement in September 1984, id at 857 to 858; did not start the claims process until after that; did not complete it until the Spring of 1985; and did not establish a distribution plan until May 28, 1985. See In Re Agent Orange, 611 F. Supp. 1396 (E.D.N.Y.) aff'd in part, rev'd in part, 818 F.2d 179 (2nd Cir. 1987). After the claims process disclosed that the claims exceeded 150,000 (in December of 1984 - by early Spring of 1985 they approached 250,000), Musslewhite withdrew his support of the settlement, urged the Court to rescind its approval and set the cause for trial on the merits. The Court refused and the other members of the AOPMC refused to withdraw their support of the settlement. Musslewhite resigned from the AOPMC and he and his clients opposed the settlement on appeal. See In Re Agent Orange, 818 F.2d 179 (2nd Cir. 1987) cert. denied in Pet. No. 87-620, 487 U.S. 1234 (1988). The AOPMC challenged Musslewhite's right to oppose the settlement on appeal, but the Second Circuit held that he was not barred from doing so. In Re Agent Orange, 800 F.2d 14 (2nd Cir. 1986).

this Court. See notes 3 and 41, infra. In conflict with decisions of this Court and several courts of appeals, this doctrine permits federal district judges to ignore Congress' seven precise removal provisions and to remove cases from state courts whenever they deem it necessary. In the words of the Second Circuit, the All Writs Act permits district judges "to remove an otherwise unremovable state court case" in the discretion of the judge, "when the need arises." **A8-A9**.

In this extraordinary case, a total of 21 States appeared as *amici curiae* to caution the Second Circuit that the failure to reverse the district court would invite "every federal district court to circumvent the removal statutes and other specific jurisdictional legislation and to transform the All Writs Act into a general grant of federal jurisdiction and a broad license to interfere with state court proceedings." Brief *Amici Curiae* of the State of Alabama, et al. at 16. The 21 States termed this radical doctrine "a breach of the walls of comity and federalism that have been erected by Congress and

the Supreme Court to ensure the continued vitality of our nation's parallel state and federal judicial system," and "an ill-advised erosion of judicial federalism." Id. at 16-17.

Unfortunately, this concern for judicial federalism was not heeded. Instead, the Second Circuit reaffirmed its "All Writs removal" doctrine (sometimes referred to hereafter as the Yonkers doctrine). **A8-A9**. This Court should grant certiorari to address what the 21 States correctly described as "an illegitimate judicial amendment of Congress's removal statute." Id. at 18.

Even if federal removal jurisdiction somehow exists in this case, there is a further question worthy of review by this Court: under Fed. R. Civ. P. 23 and due process, in what circumstances (if any) may already injured named plaintiffs, in a Rule 23(b)(3) class action for money damages, contract to extinguish the unaccrued future legal claims of absent

persons?[2] The binding effect of class actions on absent persons is an important issue, as illustrated by this Court's current consideration of the issue in the context of non-opt out, Rule 23(b)(2) class actions, in Ticor Title v. Brown, No. 92-1988. This petition presents fundamental aspects of the issue not present in Ticor Title, which are worthy of this Court's review regardless of the disposition of that case.[3]

C. Proceedings in Texas.

As the 21 States noted, "[t]his case involves tort claims brought under Texas law in

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[2] Those who had no manifestation of injury until after the original class action was settled in 1984-5 will generally be referred to as "future claimants".

[3] Indeed, Ticor Title is a case where, in a "subsequent" action by absentee plaintiffs, the court correctly assumed the duty to adjudicate the collateral attack upon the prior class action settlement. However, we doubt the validity of the portion of Ticor Title wherein the Ninth Circuit stated that "we will not second-guess a prior decision that counsel adequately represented a class." Brown v. Ticor Title Ins. Co., 982 F.2d 386, 390 (9th Cir. 1992) cert. granted. No. 92-1988. See discussion of the principle that the court that settles a class action "cannot predetermine" the question of adequate notice, adequate representation, opportunity to opt-out and due process, at pp. 45-48, infra. In any event, Ticor Title does not involve future claimants, does not involve the extraordinary issues of removal/remand that are present in this case and does not involve the spectacle of the court virtually ignoring the collateral attack doctrine, as the lower courts have done in this case.

a Texas state court by Texas plaintiffs against a Texas defendant and other defendants." Brief *Amici Curiae* at 1. The Ivy case was filed in 1989 in the District Court of Orange County, Texas and the Hartman petition was filed in 1990 in the District Court of Harris County, Texas.[4] Petitioners are Vietnam veterans and members of their families. They allege that they have suffered serious physical injuries as a result of wartime exposure to the chemical herbicide "Agent Orange."[5] As the court below acknowledged,

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[4] Petitioners in both cases brought suit on their own behalf, but also included class action allegations. Ivy Original Petition at 16-18 (Joint Appendix ("JA"), 2d Cir. No. 92-7575, at 63-65) and see Original Petition, Hartman case, **A98 to A127**. Although petitioners have vigorously represented the interests of the putative class since 1989, they do not assert that a class action is necessarily appropriate for other than limited pretrial purposes. The Texas courts took no action to certify the class in this case prior to removal nor was class certification addressed in the district court. Thus, all that is currently before this Court is petitioners' claims seeking recovery for their own injuries.

[5] Agent Orange was manufactured by respondents. The petition alleges that Agent Orange "contained, as a byproduct of the manufacturing process, one of the most toxic chemicals known to man, a compound commonly referred to as TCDD or 'dioxin'" and that while in Vietnam petitioners "absorbed the deadly chemical through the air, through the skin and . . . through water and food." Ivy petition, **JA at 55**; Hartman petition, **A108**. Petitioners seek damages for deaths and suffering from lymphomas, soft-tissue sarcomas, and other serious diseases that were caused by the veterans'

"[t]here is no complete diversity of citizenship, and no federal issue is apparent in the complaints," **A7**, so that a state court was the only forum available to petitioners.[6] The case could not have been filed in federal court.

Nevertheless, respondents removed the case to federal court, citing two grounds for 28 U.S.C. § 1441 original jurisdiction removal, neither of which was ultimately accepted.[7] Both

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exposure to Agent Orange in Vietnam; their family members seek damages for resulting wrongful death, loss of consortium, economic loss, and other harm. Ivy petition, **JA 59**, **60**; Hartman petition **A116**, **117**. The asserted causes of action arise under Texas statutes and common law, alleging defective design and manufacture, breach of express and/or implied warranties, strict products liability, negligence, failure to warn, breach of warranty, and deceptive trade practices. Ivy petition, **JA 55**, **63**; Hartman petition, **A108**, **109-114**.

[6] The Second Circuit earlier held that federal law provides no legal remedy against respondents for injury as a result of the wartime use of Agent Orange. In Re "Agent Orange" Product Liability Litigation (hereinafter "Agent Orange"), 635 F.2d 987 (2d Cir. 1980), cert. denied, 454 U.S. 1128 (1981).

[7] As the district court below summarized: "[T]he defendants offered two grounds for federal subject matter jurisdiction. First, the court was said to have jurisdiction over this action 'because most of the plaintiffs' claims have already been asserted and adjudicated in federal court and plaintiffs' petition is merely an artful pleading to avoid federal jurisdiction.' Second, the court's jurisdiction was invoked 'pursuant to 28 U.S.C. §1331 based on the doctrine of complete federal preemption.'" **A45** (quoting Notice of Removal). See Hartman Remov. Pet. **A136-137**. The district court accepted the "artful pleading"

courts below upheld removal, however, on the theory that the All Writs Act permits district judges to remove otherwise non-removable cases

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theory, see Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2 (1981), as a ground for removal. **A54**. The Second Circuit reversed, however, holding that the district court's "artful pleading" analysis misread applicable precedent. **A8**. Respondents abandoned their "complete preemption" theory.

Respondents belatedly moved in the district court "to amend their notice of removal to assert removal pursuant to 28 U.S.C. §1442(a)(1)," on the peculiar theory that when they designed and marketed herbicides containing a deadly poison (which the government ultimately bought for use in Vietnam), they were somehow "persons" acting under a "federal officer" within the meaning of that provision. **A6**. Although neither the district court nor the Second Circuit addressed the theory in this case, **A9-A10**, the issue was resolved against respondents in a companion case involving civilians exposed to Agent Orange. See Ryan v. Dow Chemical Co., 781 F.Supp. 934 (E.D.N.Y. 1992). The court ruled that respondents' challenged actions were not taken pursuant to federal direction because respondents were "being used for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants." Id. at 950. It also noted that "[t]he government sought only to buy ready-to-order herbicides, not to cause, control, or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs' injuries." Id. The court further noted that remand was compatible with International Primate Protection League v. Administration of Tulane Fund, 111 S.Ct. 1700, 1709 (1991) and observed that "[f]rom the standpoint of federalism, the mere assertion of a nebulous federal procurement interest cannot, without further specification, be a basis for removal." Id. at 951.

Thus, the sole removal issue before this Court concerns the propriety of removal under the All Writs Act.

whenever those judges deem it necessary to do so. **A8-A9, A54-A55.**

Simultaneously with filing their answer and notice of removal, respondents successfully urged the Judicial Panel on Multidistrict Litigation, over petitioners' objection, to transfer the case from Texas to Judge Jack B. Weinstein's court in the U.S. District Court for the Eastern District of New York.

D. Proceedings in the District Court.

Once the case was in the Eastern District of New York, the earlier Agent Orange litigation became the focus of the district court's decision both to uphold removal and to dismiss all of petitioners' claims.

1. The Earlier Agent Orange Litigation.

Beginning in 1978, thousands of Vietnam war veterans and their families brought state-law tort actions against the present respondents seeking monetary relief as a result of illnesses and other injuries they believed they were suffering as a result of exposure to Agent Orange. **A3.** These lawsuits were consolidated in

the U.S. District Court for the Eastern District of New York into a single action known as In Re "Agent Orange" Product Liability Litigation, MDL No. 381. **A3**. The final complaint in that proceeding alleged that all the named plaintiffs had been exposed to Agent Orange and "were thereby caused to suffer severe and permanent disabling injuries, diseases, physical disorders and disfigurement, and in some cases, death." Supplemental Appendix, 2d Cir. No. 92-7537, 860, 878. None claimed to be uninjured, to have unaccrued future claims, or to be "future claimants". None of the representative plaintiffs were future claimants, nor did any of the members of the AOPMC represent any future claimants.

On December 16, 1983, the district court certified a Rule 23(b)(3) class with opt-out rights in order to address the common issues of general causation and the military contractor defense, and set trial for six months later, on May 7, 1984. **A3-A4**. No subclass was created for future claimants and no special or separate

counsel was appointed to represent their interests. In an attempt to comply with Rule 23(c)(2), the court sent out class notice. Over respondents' objection, the class was defined to consist of all veterans and their families who had a "subjective" basis for claiming that Agent Orange had harmed them. Agent Orange, 100 F.R.D. 718, 728-29 (E.D.N.Y. 1983), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988).[8] Consequently, individual notice was directed, by first-class mail, to all persons with a lawsuit pending in federal court, or who

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[8] The district court held: "The defendants' contention that the class as the court has defined it is unworkable because it is subjective ('all veterans who were injured . . . by exposure to Agent Orange') is a non sequitur. Subjectiveness does not affect the applicability of the class trial's findings to members of the class and it does not prejudice the defendants in any way. The class is, therefore, adequately defined and clearly ascertainable." Agent Orange, 100 F.R.D. at 728-29 (citation omitted). The Second Circuit denied respondents' mandamus petition to reverse certification of the class as so defined. In Re Diamond Shamrock Chemical Co., 725 F.2d 858, 860 (2d Cir. 1984).

On final merits review at the conclusion of the case, the Second Circuit reiterated that the class definition was proper and that adequate notice was given to those who subjectively believed that they had been injured by Agent Orange: "Anyone who believed that he or she had suffered injury as a result of exposure to Agent Orange in Vietnam was on notice of the pendency of a lawsuit and was thus alerted to seek advice from counsel." Agent Orange, 818 F.2d 145, 169 (2d Cir. 1987).

had filed a complaint form with the Veteran's Administration Agent Orange Registry. Agent Orange, 100 F.R.D. at 729.[9] The court also mandated notices in major newspapers and veterans publications alerting veterans that "[i]f you or anyone in your family can claim injury, illness, death, or birth defect as a result of exposure to Agent Orange . . . you are a member of a class in an action brought on your behalf in the United States District Court for the Eastern District Court of New York, unless you take steps to exclude yourself." Id. at 734. Limited radio and television notices were also required. Id.

Future claimants, unaccrued claims or future legal claims were not mentioned in the notices nor did the notices state that the class was intended to cover those veterans who were

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[9] The Veteran's Administration had established the Registry in 1978 to help "identify all Vietnam veterans expressing a concern about the possible adverse health affects of their exposure to Agent Orange." Agent Orange, 597 F.Supp. 740, 852 (E.D.N.Y. 1984). Notice was also directed to veterans who had expressed concerns about injury to state agencies. The Governor of each state was requested to refer the class notice "to any state organization created by the executive or legislative branches dealing with the problems of Vietnam veterans". 100 F.R.D. at 730-31.

exposed to Agent Orange but who had not yet manifested any injury, or might manifest injury in the future.[10] As Mr. Hartman, one of the lead plaintiffs in this case and a veteran who was diagnosed as having non-Hodgkins disease lymphoma in 1988, stated:

> "But, as I said, I was in good health [in 1984] and had absolutely no reason to suspect that I might, four years later, develop and manifest Non-Hodgkins Disease Lymphoma. Therefore, regardless of what the notice might have said, and even if it had expressly mentioned future claims, I still would not have felt that I had anything to worry about or any reason to make a decision about opting-out of a personal injury class that, I would have reasonably thought then, would never ever have any relevance to me whatsoever. Put another way, it is impossible for me, when I am not injured and have no reason to

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[10] The Pentagon had records pertaining to every American serviceperson who served in Vietnam. Obviously, in order to give adequate notice to all those who were "at risk" – meaning those who had served in Vietnam and who had been exposed or possibly exposed to Agent Orange – each of those servicepersons who served in Vietnam would have to be sent a personal notice of the right to opt-out. See discussion at p. 61-63 infra. A notice that was recently used in the asbestos class action (appearing in the Houston Post, December 9, 1993) is far better than the one employed in the Agent Orange class action because it expressly mentions the future claimants and their rights. See **A141 to A147**. However, even if the language employed in the asbestos litigation had been used in the Agent Orange class action, it still would have been inadequate. The real question is whether <u>any</u> notice to future claimants is constitutionally possible. See discussion at pp. 58-61 infra.

> suspect that I might later develop an injury, to make an intelligent decision about what I should do with regard to a class action for those who are injured. Until I became injured I just wouldn't be able to understand what's really at stake, what I should do about opting-out and what action I should take. I probably would not be able to get a lawyer at any time before I manifested an injury, to take my case on a contingent fee basis (since I would have no injury for which damages could be recovered out of which he could receive a fee) and I could not have financially afforded to pay a lawyer on any basis other than a contingent fee.

A81 to 84.[11]

The deadline for opting out of the Rule 23(b)(3) class was May 1, 1984. Six days later, on May 7, 1984, the representative plaintiffs, all of whom were persons already claiming injury, decided to settle the case rather than commence the trial as scheduled. They received what the Second Circuit characterized as "essentially a settlement at nuisance value," Agent Orange, 818 F.2d at 171, in exchange for agreeing that all class members would be forever barred from suing

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[11] The entire affidavit of Mr. Hartman is Appendix H, at **A74 to 97**. A full reading of his affidavit will help place in proper perspective the constitutional problems relative to future claimants. See discussion pp. 57-58, infra.

the defendants for injuries from Agent Orange.[12] However, the courts below ruled that the parties agreed to bind not just the persons identified in the class notice (who subjectively believed that they had suffered injuries and that they currently had a claim). Rather, in the settlement the parties unilaterally, and subsequent to the opt out deadline, expanded the class definition, stating: "The Class specifically includes persons who have not yet manifested injury." Agent Orange, 597 F.Supp. at 865 (Settlement Agreement ¶ 8).

The settlement plan that was approved by Judge Weinstein indisputably discriminated against the future claimants. The plan fully demonstrates what happens to a group who are not

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[12] The Settlement created a fund to benefit class members and their families which, as administered, eventually allotted an average of $3,200 for death and total disability claims and nothing for other claims. See **A39**. In exchange, the named plaintiffs agreed that respondents would not be "subject to liability or expense of any kind to any member of the Class" with respect to Agent Orange and that "[c]laims against the Fund shall be the exclusive remedy . . . and all members of the Class are forever barred from instituting or maintaining an action against any of the defendants." Agent Orange, 597 F.Supp. at 8 (Settlement Agreement ¶ 5).

represented – such as the future claimants - and the price they pay for the benefit of those who were represented - the past and present claimants. A simple look at the chart on p. 1423 of 611 F. Supp., Agent Orange, 611 F. Supp. 1396, reveals this fact. The average payments for the present and past disability claimants will be almost 400% higher than the average payments for the future disability claimants and the average payments for present and past death claimants are a little over 300% higher than the average payments for the future death claimants.[13]

Again, these unilateral, post-opt actions (settlement and adoption of distribution plan) were taken without issuing any additional notices directed specifically to the future claimants; without appointing the future claimants special and separate counsel; without giving the future

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[13] This of course is another factor distinguishing this case from Ticor Title. As the Ninth Circuit noted: "In Gonzales (Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973) the class members collaterally attacked the settlement, demonstrating the class representatives secured a better monetary deal for himself than the rest of the class . . . In the MDL 633 litigation, the settlement was similar for each class member". 982 F.2d at 390.

claimants any opportunity to opt out with respect to the settlement (as is being done in the asbestos litigation, see **A146**) and without giving them the right to opt out within a reasonable time after the manifestation of their injuries in the future, should that event occur.

The district court approved the settlement despite its modest size, largely on the conclusion that the scientific evidence that existed on dioxin made it "highly unlikely" that any plaintiff whose claims were then pending in the courts could establish causation. Agent Orange, 597 F. Supp. at 749.[14] The court of

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[14] The district court noted that although "[i]t is, of course, possible that in a few years a sudden increase in diseases associated with Agent Orange will be revealed . . . it appears unlikely that such proof will develop in time to affect this litigation." 597 F. Supp. at 795. See also Agent Orange, 611 F. Supp. 1223 (E.D.N.Y. 1985), aff'd, 818 F.2d 187 (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988) (granting summary judgment against opt-out plaintiffs based on insufficiency of scientific proof). There is no doubt that Judge Weinstein was wrong. Such "proof" has developed and has developed rapidly enough "to affect" the rights of numerous Vietnam veterans now suffering from lymphomas, sarcomas and other cancers and maladies. See e.g. Executive Summary, Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam, Institute of Medicine, Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides, National Academy Press, Wash., D.C., 1993 (21 pages).

appeals affirmed. Agent Orange, 818 F.2d 145 (2d Cir. 1987).[15]

2. The District Court's Removal and Dismissal of the Case.

Both the district court's decision to permit removal and its decision to dismiss petitioners' case flowed from its view that the instant action was "a direct challenge to the

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[15] The court of appeals based its decision to uphold the settlement primarily upon its conclusion that the military contractor defense would apply as a matter of law. 818 F.2d at 173, 174. This holding was clearly error. As this Court noted in Boyle v. United Technologies Corp., 487 U.S. 500, 509 – 510 (1988) the defense does not apply to those products that the private manufacturers have in "stock" or where the government purchases them "off-the-shelf". The undersigned counsel, as a member of the AOPMC trial team, was in charge of opposing the military contractor defense at the impending trial and the evidence that would have been introduced would have overwhelmingly established that Agent Orange was purchased off-the-shelf and was not manufactured in accordance with the specifications (the specifications did not call for the presence of dioxin). Therefore, the defendants would have probably failed as to at least two of the three elements of the defense. See discussion of the three elements, 487 U.S. at 512. The failure as to any one of the three elements precludes the application of the defense. Thus, the entire foundation for the Second Circuit's approval of the settlement is now highly questionable. This factor may become relevant in these collateral attacks upon the settlement. One reason for this is that a settlement for "nuisance value" had been held to be inadequate where there is a prima facie case on liability. See e.g. City of Detroit v. Grinnell, 495 F.2d 448, 455 (2d Cir. 1974). See discussion of the factors that can be considered in a class action collateral attack at pp. 43-48, infra.

validity of the settlement" that the named plaintiffs had negotiated with defendants, and which the court approved. **A42**.

Thus, the district court ruled that "removal was proper because the court . . . must enforce its bar on subsequent suits by class members against the defendants." **A48**. The district court relied on a removal doctrine articulated by two earlier Second Circuit decisions (see pp. 47-50, infra), holding that the All Writs Act, 287 U.S.C. § 1651(a), "permits a federal court to remove state court actions to federal court [even] in situations where specific statutory removal authority is absent." **A55**.

The district court granted the motion to dismiss, finding that "[t]he terms of the Settlement Agreement . . . bar plaintiffs from proceeding with this action." **A55**. Petitioners argued that, as of the opt out deadline, they had been unaware of any injuries from Agent Orange, and thus the named plaintiffs had no authority to

bind them.[16] Under the 1984 class definition and class notice, of course, only veterans and their families who had a subjective basis for believing, as of May 1, 1984, that they were suffering injuries from Agent Orange exposure were in the class and were required to opt out to preserve their rights to future suit. The district court held that this point was "irrelevant" and that the parties to the settlement had legitimately decided (with the court's approval), after the Rule 23(b)(3) opt out period had passed, to expand the class and extinguish the unaccrued future claims of "persons who have not yet manifested injury." **A55** (quoting settlement). Extinguishing such claims, the district court explained, advances "the interests of presently injured plaintiffs as well as defendants in achieving a settlement," by

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[16] The uncontradicted record shows that the first symptoms of petitioners' injuries manifested themselves only after the opt-out deadline. See e.g. Hartman affidavit, **A77**. There is no evidence in the record that any of petitioners "believed that he or she had suffered injury as a result of exposure to Agent Orange in Vietnam", as of the date of the settlement. See entire record and Hartman's affidavit, **A74 - A97**.

setting "definitive limits on defendants' liability." **A58**.

E. Proceedings in the Second Circuit.

On appeal, the Second Circuit found no basis for removing the case in the removal statutes enacted by Congress. Instead, the Second Circuit reiterated its view that "a district court, in exceptional circumstances, may use its All Writs authority to remove an otherwise unremovable state court case." **A8**. The "exceptional circumstances" in this case involved an undefined "deleterious effect" of allowing "Agent Orange victims . . . to maintain separate actions in state court." **A8**. The court was concerned that such suits raised the prospect that a state court would have to "decid[e] the scope of the Agent Orange I class action and settlement," so that the task would not fall to "[t]he court best situated to make this determination" - namely, "the court that approved the settlement." **A8-A9**. Removal jurisdiction was supposedly necessary to help the district

court "guard[] the integrity of its rulings in complex multidistrict litigation." **A9**.

Thus, for the third time (see pp. 47-50 infra), the Second Circuit employed the All Writs Act to allow district judges to fashion their own removal jurisdiction "'when the need arises.'" **A9**. Further, it made clear that whether or not "exceptional circumstances" exist to create such removal jurisdiction is a matter left to the "proper exercise of judicial discretion." **A9**.

After upholding removal, the Second Circuit rejected petitioners' claim that to permit the parties to the 1984 settlement to extinguish petitioners' unaccrued future claims, without notice and opt-out rights, violated Rule 23 and due process. The Second Circuit went even further than the district court to hold that there is no due process barrier at all preventing already injured plaintiffs from negotiating away the legal claims of absent persons with no manifested injury, as long as those persons are not "known" – that is, no one (including them) knows that they will be injured and might wish to

sue in the future. **A16**.[17] The Second Circuit was also unconcerned that "many genuine conflicts of interest' [can exist] in a situation such as this," so that separate class counsel, appointed to represent the future claimants, should have decided whether to extinguish the unaccrued future claims of absent plaintiffs who had not yet suffered injury. **A17** (quoting district court). The court opined that a conflict "never materialized" because all veterans became

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[17] The court's rationale for this holding was that, in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), this Court addressed only the ability of named plaintiffs "to bind known plaintiffs concerning money damages", and "intimate[d] no view concerning other types of class actions." **A16** (quoting 472 U.S. at 811 n.3) (emphasis added). Rather than reading this statement as disclaiming any holding about lawsuits for equitable relief (like the Ticor Title case now before this Court), the Second Circuit believed that it somehow would have "to extend Shutts" in order to prevent named plaintiffs from extinguishing the unaccrued claims of absent persons for money damages, before they even know those claims exist. **A16**. Refusing to "extend" Shutts to provide procedural guarantees to such persons, the court opined:

> "[S]ociety's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best. . . . [P]roviding individual notice and opt-out rights to persons who are unaware of an injury would probably do little good."

A17. We certainly agree with that last statement to the extent that there really is no constitutional way that future claimants can be given adequate notice of the right to opt out of a personal injury class action. See pp. 58-60, infra and see Hartman's Affidavit. **A84 - A96**.

eligible for identical "nuisance value" payments from the Fund. **A12**[18] This latter conclusion ignored the indisputable fact that the settlement discriminated against the future plaintiffs. See pp. 18, supra.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DETERMINE WHETHER FEDERAL DISTRICT JUDGES MAY USE THE ALL WRITS ACT, IN THEIR DISCRETION, TO REMOVE AN "OTHERWISE UNREMOVABLE STATE COURT CASE".

This case raises issues of judicial restraint and federalism so serious that a total of 21 States appeared as *amici* below to protest what they termed "an illegitimate judicial amendment of Congress's removal statute." Brief *Amici Curiae* at 18.

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[18] The Second Circuit suggested here that "ensuring that [persons unaware of their injuries] receive vigorous and faithful vicarious representation" was a constitutionally adequate substitute for the right to notice and to opt out. **A17**. Thus, the court refused to require that uninjured absent persons unaware of their rights have independent class counsel. Nor did the Second Circuit address the inherent conflict revealed by the district court's own rationale for denying notice or opt out: to advance the interests of presently injured plaintiffs and defendants in the settlement. **A58**.

Whether removal can ever be effected by means other than the pertinent statutes enacted by Congress is a question on which the lower courts have divided, making review by this Court all the more critical. The Second Circuit, and two district courts in other circuits, have held that there is removal power under the All Writs Act.[19] Three circuits have disagreed, holding that only Congress' jurisdictional statutes can authorize jurisdiction in a case.[20]

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[19] Hornsby v. Hornsby's Stores, Inc., 1991 WL 33672 (N.D. Ill. 1991) ("[s]tate claims precluded by the res judicata effect of a federal judgment may be removed to federal court" even when there is no basis other than the All Writs Act for removal); Nowling v. Aero Servs. Int'l, Inc., 734 F. Supp. 733, 738 (E.D. La. 1990) ("Other statutes vest federal courts with the authority to exercise [removal] jurisdiction . . . for example, the All Writs Act").

[20] See Westinghouse Elec. Corp. v. Newman & Holtzinger, 992 F.2d 932, 937 (9th Cir. 1993) (All Writs Act does not "provide[] an independent source of removal jurisdiction to the district court"); Willy v. Coastal Corp., 855 F.2d 1160, 1164 (5th Cir. 1988) ("The right to remove a case from state to federal court derives solely from the statutory grant of jurisdiction in 28 U.S.C. §1441"), Commercial Security Bank v. Walker Bank & Trust Co., 456 F.2d 1352, 1355 (10th Cir. 1972) ("Section 1651(a) does not operate to confer jurisdiction"); Hamilton v. Nakai, 453 F.2d 152, 157 (9th Cir. 1972), cert. denied, 406 U.S. 945 (1972) ("This statutory provision does not confer original jurisdiction, but rather, prescribes the scope of relief that may be granted when jurisdiction otherwise exists"); M. Brittingham v. United States Comm'r of Internal Revenue, 451 F.2d 315, 317 (5th Cir. 1971)

A. The Yonkers Doctrine Is Constitutionally Indefensible and Should Be Repudiated in Its Entirety.

The grounds for removal of cases from state court are simple enough. They are set out at 28 U.S.C. §§ 1441 to 1452. Seven distinct provisions exist: (1) § 1441(a) (original jurisdiction removal); (2) § 1441(d) (removal by a foreign state); (3) § 1442 (removal by a federal officer or property holder); (4) § 1442(a) (removal by a member of armed forces); (5) § 1443 (removal in civil rights cases); (6) § 1444 (removal in foreclosure actions against federal government); and (7) § 1452 (removal of claims related to a bankruptcy case).

This set of provisions is the product of congressional deliberation about how much to restrict "[t]he power reserved to the states under the Constitution to provide for the determination of controversies in their courts."

("[The All Writs Act] empowers [courts] to issue writs in aid of jurisdiction previously acquired on some other independent ground"). See also United States v. Hall, 583 F. Supp. 717, 718 (E.D. Va. 1984) ("[T]he All Writs Act is not a means by which a district court may extend its authority in areas where it otherwise has no jurisdiction").

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-109 (1941).[21] Congress made it clear that,

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[21] The importance of deference to congressional choices in this area has led this Court to caution that "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." Healy v. Ratta, 292 U.S. 263, 270 (1934). This Court has made the point in the specific context of removal jurisdiction. See American Fire & Casualty Co. v. Finn, 341 U.S. 6, 18 (1951) ("To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit . . . would by act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress denied them"). Cf. Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) (discussed in note 34, infra). The Court stated in Sheets:

> "Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution."

313 U.S. at 108-109.

Many lower courts have emphasized the need to narrowly construe the removal statute. See, e.g., United States ex rel. Walker v. Gunn, 511 F.2d 1024, 1027 (9th Cir.) ("The right of removal being in derogation of state sovereignty, should not be enlarged beyond what is definite and free from ambiguity") (internal quotations and citations omitted), cert. denied, 423 U.S. 849 (1975); Armstrong v. Alabama Power Co., 667 F.2d 1385, 1388 (11th Cir. 1982) ("Finally, it [strict construction of removal jurisdiction] preserves the plaintiff's right to choose a state forum. To serve

when the Judiciary Act of 1887 was adopted, amending the Act of 1875, federal question removals on the basis of federal "defenses" would no longer be possible. See Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 nte. 9 (1983).[22]

The Second Circuit, however, has not been satisfied to adhere to the jurisdictional structure of the 1887 Act, which allows much less removal authority than existed under the 1875 Act. Rather, the Second Circuit has taken the view that Congress' choice in 1887 to restrict the 1875 removal statute can be circumvented by

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these purposes, the federal courts must carefully scrutinize the bounds of removal jurisdiction, even to the point of apparently impractical detail - for these details in the given case eventually guarantee higher goals in all cases"); Mercy Hosp. Ass'n v. Miccio, 604 F. Supp. 1177, 1179 (E.D.N.Y. 1985) (Weinstein, C.J.) ("The right to removal is a statutory grant to be strictly construed . . . . The defendant seeking removal must base the petition on specific removal provision and specific grant of original jurisdiction").

[22] Accordingly, "it is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987) (emphasis in original) (citing Franchise Tax Board, 463 U.S. at 12).

judges based on reference to a separate law: the All Writs Act, of all things! That Act has remained substantially unaltered since 1789,[23] and has never been addressed by Congress in setting removal policy during the past two centuries. Yet, according to the Second Circuit, the Act provides an independent source of authority for subject-matter jurisdiction on removal.[24] Despite an early dissent from the court, it now appears well entrenched in the Second Circuit.[25]

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[23] The present version of the All Writs Act originated as § 14 of the Judiciary Act of 1789, 1 Stat. 81-82. See Pennsylvania Bureau of Corrections v. United States Marshals, 474 U.S. 34, 40-41 (1985).

[24] Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 865 (2d Cir. 1988), cert denied, 489 U.S. 1077 (1989). We will generally refer to the All Writs removal doctrine as the "Yonkers" doctrine.

[25] Dissenting in Yonkers, Judge Mahoney castigated the Second Circuit's creation of an All Writs removal doctrine to launch "a preemptive strike upon state courts" as "novel and unwarranted", pointedly noting that, like federal judges, state court judges are "sworn to support the Constitution of the United States. Accordingly the state court was entitled to a presumption at the outset" that it would proceed appropriately. 858 F.2d at 875 (Mahoney, J., dissenting). No other Second Circuit judge has ever dissented from use of the doctrine, however, and the suggestion below for rehearing en banc attracted no vote. Thus, the doctrine appears to be settled law in the Second Circuit.

The Second Circuit's Yonkers doctrine poses a threat to two fundamental aspects of this Court's jurisprudence: judicial restraint and judicial federalism. **First**, the doctrine constitutes "an illegitimate judicial amendment of Congress's removal statute," Brief *Amici Curiae* of the 21 States, at 18, that this Court should not permit to stand. It is well settled that "[a]ll federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution." Lockerty v. Phillips, 319 U.S. 182, 187 (1943). Thus, whenever an objection is raised to removal "[t]he fundamental question to be determined is whether the removal . . . from the state court into the Federal court was authorized by any statute of the United States." Kentucky v. Powers, 201 U.S. 1, 24 (1906). In resolving such an issue, of course, courts must "scrupulously

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For a more detailed description of Yonkers and the steadily increasing ambit of the Second Circuit's All Writs removal doctrine, see pp 48-52, infra.

confine their own jurisdiction to the precise limits which the statute has defined." Healy v. Ratta, 292 U.S. at 270; Shamrock Oil and Gas v. Sheets, 313 U.S. at 108, 109.[26]

The language of the All Writs Act hardly suggests that it grants judges the power to create or define their own jurisdiction. Rather, it appears to provide tools for judges to use in exercising whatever jurisdiction they happen to possess — to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a) (emphasis added). The Second Circuit below refused to accept this limit. **A9**.

This Court was quite clear in Pennsylvania Bureau of Corrections v. United States Marshals, 474 U.S. 34, 43 (1985) that the All Writs Act

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[26] Since the inception of our federal system, it has been settled that "[c]ourts created by statute can have no jurisdiction but such as the statute confers." Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850). Where jurisdiction is not expressly conferred, it is assumed not to exist. See Durousseau v. United States, 10 U.S. (6 Cranch) 307 (1810).

must be disregarded once Congress has spoken on a subject:

> "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling."

474 U.S. at 43.[27]

This case is especially suited for testing the outer limits of the All Writs Act, for here the Second Circuit has sought to countermand a considered policy judgment of Congress. The district court upheld removal of petitioners' Texas state court case on the basis of defendants' argument that "the binding effect of

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[27] Indeed, at least two decisions of this Court have resisted far more modest arguments that the Act should be used to supplement the structure of appellate jurisdiction and procedure established for this Court by Congress. Chandler v. Judicial Conference of the Tenth Circuit, 398 U.S. 74, 86 (1970) (holding that the All Writs Act "'authority of this Court to issue a writ of prohibition or mandamus can be constitutionally exercised only insofar as such writs are in aid of its jurisdiction,'" and that review of Chandler's claims would "do[] violence to the constitutional requirement that such review be appellate.") and United States v. FMC Corp., 1963 U.S. LEXIS 2449 (1963), (Goldberg, Circuit Justice), (the Circuit Justice ruled that the All Writs Act "may not be employed to evade the specific restrictions" of the jurisdictional statute, and that no writ could issue "as a substitute for an authorized appeal.")

the Settlement Agreement" barred petitioners' lawsuit. **A55**. Even assuming that the interpretation of the Settlement Agreement raised any issue of federal law, at most the defendants have a federal res judicata defense to suit in the Texas state court. But more than a century ago Congress barred any such theory for removal, and has so far rejected all proposals to water down its stance.[28] The Second Circuit's attempt to serve, to borrow an apt phrase, as "a sort of junior-varsity Congress," Mistretta v. United States, 488 U.S. 361, 427 (1988) (Scalia, J., dissenting), should be overturned.

Second, beyond the Second Circuit's circumvention of well-accepted principles of judicial restraint, certiorari is also warranted because its blanket grant of permission to remove cases whenever district judges find "exceptional circumstances" flouts this Court's teachings on

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[28] "Commentators have repeatedly proposed that some mechanism be established to permit removal of cases in which a federal defense may be dispositive." Franchise Tax Board, 463 U.S. at 10 n.9 (citing proposals). Unfortunately for defendants, of course, "those proposals have not been adopted." Id.

judicial federalism and the respect due the coordinate judicial systems of the States.

In explaining the "exceptional circumstances" supposedly requiring that this case be removed, the Second Circuit made little effort to mask its distrust of the abilities of the Texas state courts. Permitting the case to go forward in Texas would have a "deleterious effect", according to the Second Circuit, because the state court would have to "decid[e] the scope" of the 1984 settlement and the associated collateral attack and due process issues. **A8-A9**. The Second Circuit thought it critical that the judge who "approved the settlement" – the judge "best situated to make this determination" – decide the preclusive effect of the prior settlement agreement. **A9**[29]. State courts apparently cannot be trusted to "guard[] the integrity of [federal court] rulings in complex litigation." Id.

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[29] But see, discussion of the class action collateral attack doctrine at pp. 43-47, infra.

Obviously, the Texas state courts in this case should have been presumed competent to adjudicate the preclusive effect of the 1984 settlement.[30] If state courts are competent to determine federal constitutional rights, then *a fortiori* there is no basis for denying them responsibility for adjudication of the preclusive effect of a settlement and the issues arising under the class action collateral attack doctrine. Indeed, one key feature of judicial federalism is that federal and state courts alike are trusted to give appropriate effect to the results of litigation in the other judicial system. See Kline v. Burke Const. Co., 260 U.S. 226, 230 (1922) ("Whenever a judgment is rendered in one of the courts [either federal or state] and pleaded in the other, the effect of that

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[30] As an essential feature of comity, state courts are routinely entrusted with the adjudication of federal rights, including federal constitutional rights. See, e.g., Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 150 (1988) ("Texas state courts . . . are presumed competent to resolve federal issues"). See also Paul M. Bator, The State Courts and Federal Constitutional Litigation, 22 Wm & Mary L. Rev. 605, 625 (1981). ("If we want state judges to feel institutional responsibility for vindicating federal rights, it is counterproductive to be grudging in giving them the opportunity to do so.")

judgment is to be determined by the second court"); Donovan v. City of Dallas, 377 U.S. 408, 412 (1964).[31]

As 21 States firmly observed in their *amicus* brief below:

> "For as long as there has been a common law ... when a prior judgment of a court in another jurisdiction, whether state or federal, has been raised as a bar to litigation of a claim, the issue has been

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[31] These precedents comport with a fundamental principle of our federal system, that "(a) state court is as well qualified as a federal court to protect a litigant by the doctrines of res judicata and collateral estoppel." Southern California Petroleum Corp. v. Harper, 273 F.2d 715, 719 (5th Cir. 1960); accord Bluefield Community Hospital Inc. v. Anziulewicz, 737 F.2d 405, 408 (4th Cir. 1984).

Consistent with this principle, in the area of consent judgments it is quite improper for a court to hold, as the Second Circuit below did, that the individual judge who reviewed and approved a settlement has a special, subjective insight into its meaning. For example, in one prominent case the D.C. Circuit refused to defer to Judge Harold H. Greene's subsequent interpretations of a consent decree provision that he himself had drafted in the case that broke up the Bell System, despite Judge Greene's decade of intensive experience with that enormously complicated case. See United States v. Western Electric Co., 900 F.2d 283, 293-94 (D.C. Cir.), cert. denied 498 U.S. 911 (1990). The D.C. Circuit ruled that although an appellate court should "take careful account of the explanatory opinion issued by the district judge at the time the decree was entered," id. at 294 n.10, it had to "reject (any) suggestion" Judge Greene's later view of the decree "should be afforded some 'special' deference," even though he had a major part in "draft(ing) the pivotal provision" and even though he "had enormous experience overseeing the case and the decree since its inception." Id. at 294. See also Jeff D. v. Andrus, 899 F.2d 753, 759 (9th Cir. 1989).

> decided by the court at hand, not referred back to the court that entered the original judgment."

Brief *Amici Curiae* at 3 (emphasis in original).[32] Indeed, when class action consent decrees are involved, an even more forceful rule applies: the court that enters the decree is forbidden from predetermining the res judicata effect of the decree; that task must be assumed by a "subsequent court", the court in which the absentee plaintiffs file their suit seeking relief on the merits. See discussion of class action collateral attack doctrine, at pp. 43-47, infra.

The States further warned that "(t)o affirm the decision below would be to invite every federal district court to circumvent the removal

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[32] The States objected that the district court had "supplanted this time-tested rule with a radical new one: when a federal class action judgment is involved *only* the court that handed down the original judgment is qualified to decide" the preclusive effect of the prior settlement. Id. (emphasis in original). They pointed out that this theory is "contrary to common sense" and destructive of judicial federalism," id., and called the district court's seizure of the case on this theory an "unprecedented, unwarranted, and unwise ... invasion of state judicial independence and an insult to state courts throughout the nation, which are perfectly capable of deciding whether a state law claim is barred by a prior federal judgment." Id. at 18.

statutes and other specific jurisdictional legislation and to transform the All Writs Act into a general grant of federal jurisdiction and a broad license to interfere with state court proceedings." Brief *Amici Curiae* at 16. Yet the Second Circuit analyzed none of these federalism concerns, failing to mention the States' arguments even in passing.[33]

It should be noted that the Second Circuit's expansive view of removal jurisdiction under the All Writs Act, in derogation of state courts, also contravenes the policies of the Tenth Amendment.[34] Moreover, the district

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[33] Indeed, in the aspect of its opinion most dangerous for judicial federalism, the court made clear that district judges are free to resort to All Writs removal in the "exercise of judicial discretion" whenever they believe "'the need arises.'" **A9**. Thus, ad hoc seizure of state court jurisdiction is given no more appellate scrutiny than is afforded garden-variety trial court evidentiary determinations. See, e.g., Salem v. United States Lines Co., 370 U.S. 31, 35 (1962) (describing leniency of evidence review standard). This is contrary to fundamental removal law. See discussion of "no possibility rule" at pp. 51, 52 and nte. 42, infra.

[34] One of the "powers [reserved to the states under the Amendment] was the maintenance of state judicial systems for the decision of legal controversies." Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 285 (1970). See also Pennzoil Co. v. Texaco, Inc. 481 U.S. 1, 12-13 (1987) ("This Court repeatedly has recognized that the States have

court's continuing jurisdiction in this case could not have been threatened by petitioners' Texas action. Their case manifestly was not, despite the district court's assertion, a "challenge[]" to the settlement agreement. **A49**. Rather, petitioners sought to pursue their own suit for money damages, entirely separate from the settlement, on the ground that they were not bound by it.[35]

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important interests in administering certain aspects of their judicial systems.") Given that the integrity of an important state institution is at stake, this Court should accord review to a judicial interpretation of the All Writs Act that deprives state courts of their traditional authority to resolve the preclusive effect of judgments of another sovereign. Accordingly, in Gregory v. Ashcroft, 111 S. Ct. 2395 (1991), this Court refused to read a federal statute, the Age Discrimination in Employment Act, so as to constrain state judicial systems by forbidding mandatory retirement of state court judges. Id. at 2408. Cf. New York v. United States, 112 S. Ct. 2408, 2428 (1992) (Tenth Amendment prohibits federal statutes which are interpreted to "infring[e] upon the core of state sovereignty ... a state's ability to make and apply its own laws") (emphasis added). Thus, in light of the Tenth Amendment, federal statutes should not be construed to impinge on fundamental state institutions without a clear statement of congressional intent requiring that outcome. No such clear statement appears on the face or in the legislative history of the All Writs Act.

[35] The settlement agreement provided that the district court would retain jurisdiction only "over the Fund pending its final disposition," In Re Agent Orange, 597 F. Supp. at 866 (Settlement Agreement ¶ 19), with a duty "to assure that the Fund shall earn the maximum interest consistent with safety and that all disbursements are properly made." Id. at 864

Finally, the availability of authority under the All Writs Act to issue injunctions "in aid of ... jurisdiction[]" indicates that there is no power to remove a state court action on that basis. Indeed, Congress went so far as to enact an exception to the Anti-Injunction Act using these same words. See 28 U.S.C. § 2283 (exception "where necessary in aid of its jurisdiction").[36] Thus Congress was careful to vest the federal courts with targeted equitable powers even against state courts; but it also made the deliberate decision not to provide federal courts with sweeping removal authority. To ignore the fundamental difference between the two, and to read into the removal statute a

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(Settlement Agreement ¶ 4). Nothing about petitioners' Texas lawsuit affects the operation of the Fund. The prospect that respondents may have to invoke, in a Texas forum, the supposedly preclusive effect of the settlement clearly has no bearing on the Fund; on the contrary, ¶4 of the Settlement Agreement expressly provides that at this juncture respondents "have no responsibility or obligation with respect to the Fund or distributions therefrom." Id. at 864.

[36] Also see Zipfel v. Halliburton Co., 832 F.2d 1477, 1488 (9th Cir. 1987), cert. denied, 486 U.S. 1054 (1988), mod., 861 F.2d 565 (9th Cir. 1988), holding that the aid to jurisdiction exception to the Anti-Injunction Act does not apply "where there is no jurisdiction to protect".

power to disrupt state proceedings that Congress has set out only in the context of injunctions, would effectively rewrite Congress's handiwork.

B. In View Of The Class Action Collateral Attack Doctrine, The Yonkers Doctrine Certainly Cannot Provide The Basis For Removal Of "Subsequent" State Court Actions Wherein a Prior Class Action Consent Decree May Be Collaterally Attacked.

Hansberry v. Lee, 311 U.S. 32 (1940) is this Court's fountainhead decision with respect to the class action collateral attack doctrine. That doctrine is well articulated in In Re Real Estate Title and Settlement Services Antitrust Litigation, 869 F.2d 760, 764, nte. 1, 768, 769, 770, (3rd Cir. 1989):

> "We do not agree with appell~~ees'~~ dire predictions. Ever since Hansberry v. Lee was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme. Rather than threatening the vitality of the class action mechanism, the fact that some plaintiffs will be able to extricate themselves from class action judgments if subsequent courts find them to be inadequately represented is integral to the constitutionality of the class action procedure. See Hansberry, 311 U.S. at 45, 61 S.Ct. at 120 (stating that it would violate due process to bind an inadequately represented absent party to a prior judgment) . .

> Moreover, as the Court explains in Shutts, it is partly up to the defendant to safeguard the interest of the absent plaintiffs. See 472 U.S. at 810, 105 S.Ct. at 2973. If the defendant wishes to achieve maximum preclusive effect it is up to the defendant to ensure that the class is appropriately certified, and the absent members are adequately represented. Far from wreaking havoc on the class action mechanism, we believe that our holding will foster results that most fairly balance the interests of absent class members and defendants alike."

869 F.2d at pp. 769, 770. See also Sam Fox Publishing Co., 366 U.S. 683, 691 (1961) (stating that "the judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation"); Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984); Local Number 93 v. City of Cleveland, 478 U.S. 501 (1986); and Taunton Gardens Co v. Hills, 557 F.2d 877 (1st Cir. 1977) (holding that "the court that certifies a class action 'cannot predetermine the res judicata effect of the judgment', which can 'be tested only in a subsequent action'", citing Committee Note of 1966 to Rule 23 as Revised in 1966, and 3B

Moore's Federal Practice, Sec. 23.01 [11.-3] at 2334.[37]

The Court in Yonkers made it clear that the power to remove under the All Writs Act was dependant upon the power to issue injunctions or extraordinary orders "under the Anti-Injunction Act and the All Writs Act to prevent the prosecution of state proceedings . . ." 858 F.2d at 865. It is inconceivable that an injunction could issue in the face of the Anti-Injunction Act (28 U.S.C. 2283) and under the All Writs Act

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[37] A good discussion of the class action/collateral attack doctrine can be found in Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87 Harv. L. Rev. 589 (1974). The Note discusses, with citation of supportive authority, the matters which the second court should review in determining whether a class action judgment is binding upon the absentee plaintiffs: [a] adequate notice, id. at 590, 591; [b] adequate representation, id. [c] lack of subject matter jurisdiction, id. at 593 [d] lack of personal jurisdiction, id.; [e] due process and other constitutional considerations, id. at 593; [f] whether the first court was correct in certifying the class initially, id. at 595; and [g] whether the right to opt out was properly granted to absent class members, id. at 599.

The second court "must examine the (class) representatives conduct of the entire suit to decide whether the class representatives in fact have adequately protected the interests of the class." id. at 596; emphasis ours. The Harvard Law Review Note makes two important additional observations: [i] the res judicata effect of a class action judgment "can be determined only in a subsequent action", id. at p. 593 (emphasis ours); and [ii] that determination should be made on a "de novo basis". id. at 594.

with regard to a collateral attack launched in state court by those who, with regard to the earlier class action consent decree, were absentee future claimants without one inkling that they might develop injuries in the future. These future claimants had the absolute right to attack the class action consent decree on the grounds of inadequate notice, inadequate representation, absence of opt-out and other due process grounds. Those matters have never been addressed in the context of a subsequent merits trial where issues are determined by a preponderance of the evidence.[38] Moreover, those issues could not, insofar as their res judicata effect upon a subsequent collateral attack by absentee plaintiffs is concerned, have properly been predetermined by Judge Weinstein. As noted by this Court in Chick Kam Choo v. Exxon, 486 U.S. at 147, the Anti-Injunction Act precludes

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[38] Those issues were to some extent addressed during the process for approving the 1984 settlement, but then only in the context of Judge Weinstein's "discretion" to approve or disapprove the settlement. They were never addressed vis-a-vis future claimants or in a subsequent collateral attack context. See 818 F.2d at 164.

injunctions under the relitigation exception as to all issues "not actually litigated". Since there could be no injunction or extraordinary relief, there could be no removal under the Yonkers doctrine.

C. Even If the All Writs Act Authorizes Lower Courts to Remove an "Otherwise Unremovable State Courts Case" in Some Situations, This Court Should Articulate Clear Limits on the Use of That Power.

Although All Writs removal is inappropriate in all circumstances, certiorari would be warranted even if this Court were inclined to reject that contention. At minimum, review should be granted to check the Second Circuit's spiraling pattern of jurisdictional expansion and to clarify the boundary of lower courts' authority under the All Writs Act.

As previously noted, the Second Circuit's All Writs removal doctrine originated in Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988), cert. denied, 489 U.S. 1077

(1989).[39] The Second Circuit substantially broadened the doctrine in United States v. City of New York, 972 F.2d 464 (2d Cir. 1992), this time upholding All Writs removal even absent the need to vindicate federal constitutional rights.[40]

Unlike the Second Circuit's two earlier cases involving its novel removal doctrine, however, this case presents no threats to respondents' or third parties' constitutional rights, and no possibility that respondents might be subject to conflicting state and federal

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[39] The City of Yonkers had pursued a policy of racial segregation in allocating public housing and, as a result, had violated minority housing residents' federal constitutional and statutory rights. Under the obligation of a federal court order, the city sought to remedy this violation by initiating condemnation proceedings in state court. Although the case was not otherwise removable, the Second Circuit permitted removal under the All Writs Act because the district court was confronted "both with the need to vindicate the constitutional rights of those ... who have been denied fair housing and the very real possibility that the City of Yonkers would be subjected to inconsistent orders from the state court and the federal court." Id. at 863.

[40] Faced with a state court suit concerning the validity of procedures under a federally ordered sewage disposal plan, the court held that the mere possibility that New York might be subject to inconsistent federal and state decrees alone was sufficient to justify removal. Id. at 469.

injunctive orders. In short, this case presents neither of the rationales supporting the Yonkers or City of New York decisions. The courts below nevertheless approved removal yet again, this time of a quintessentially state-law case, finding the existence of "exceptional circumstances" - here, the courts' view that the Texas state courts might rule incorrectly on whether the 1984 settlement precluded suit.

Certiorari was not sought in City of New York, and the certiorari briefing in Yonkers revealed an inappropriate vehicle for review.[41] This case thus represents the first real opportunity for scrutiny of the Second Circuit's

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[41] The petition for certiorari in Yonkers presented the issue in nine pages as one involving error on the facts of the case. Petition for Certiorari, Yonkers Racing Corp. v. City of Yonkers, No. 88-1029, at 7-15. Indeed, Rex Lee appeared on behalf of the City of Yonkers opposing certiorari, noted that "the decision is sui generis" and that petitioner had "argue(d) only that the decision is 'based upon a misapplication of a recent decision of this Court.'" Brief of Respondent City of Yonkers in Opposition, No. 88-1029, at 12-13 (quoting petition). Finally, although the City agreed that the Second Circuit had erred in using the All Writs Act to remove the case, id., it nonetheless urged: "The error below is, in the circumstances of this case, purely a procedural one. Because the district court clearly was correct in its ultimate conclusion that the City should prevail in the condemnation proceedings, any reversal now would merely delay the ultimate implementation of the district court's remedial orders." Id. at 13.

radical new All Writs removal doctrine and certiorari is warranted to put an end to "an illegitimate judicial amendment of Congress's removal statute." Brief *Amici Curiae* at 18.

And should the Court, at the end of the day, decide that some form of the Yonkers All Writs removal doctrine is to be permitted, there is an urgent need for the Court to articulate its parameters. As noted above, the Yonkers court indicated that unless an injunction against the state court action would be appropriate, removal would be inappropriate. Surely, if such a radical new doctrine is going to be approved it should contain that limitation and the presence of that limitation in this case would mean that the removal was improper.

Moreover, the Court would need, we respectfully submit, to address just how the class action collateral action doctrine affects the Yonkers doctrine. Neither Yonkers nor City of New York involved class actions. The Second Circuit refused to directly address this issue in this case; it finessed it by simply stating that

"nothing in the Constitution or in our jurisprudence demands that class members have an unchallengeable choice of forums in which to launch (a collateral attack upon a class action consent decree). . ." **A11**. We submit that, even if the Court approves the Yonkers doctrine, it should, because of the important constitutional impact of the class action collateral attack doctrine, consider whether the application of the doctrine with respect to state court actions, filed by absentee class members subsequent to a federal class action consent decree, should be precluded.

Finally, since the subsequent collateral attack upon a class action consent decree will be so fact-intensive ("de novo" determination of how the entire prior class action was handled), we respectfully suggest that the Court consider whether, before the courts can approve removal on the basis of the Yonkers doctrine, the removing defendants must meet the heavy burden of "clearly showing" in their removal papers that there is "no possibility" that plaintiffs could succeed in

the state court with regard to at least one of the grounds for collateral attack. Like the burden applied in "fraudulent joinder" removals, such a burden would be consistent with due respect for federalism and the strictness with which removals should be permitted. See Wilson v. Republic Steel, 311 U.S. 104 (1921); Green v. Amerada Hess Corp., 707 F.2d 201 (5th Cir. 1983); East Texas Mack Sales v. North American Acceptance Corp., 819 F.2d 116 (5th Cir. 1987); and Polous v. Naas Foods, 959 F.2d 69, 73 (7th Cir. 1992)[42]

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[42] As noted in Green:

> "The burden of proving a fraudulent joinder is a heavy one. The removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court".

707 F.2d at p. 209. If the "no possibility" burden were applied – and surely it should be the minimum burden imposed upon the defendant if there is to be a Yonkers doctrine – for the reasons stated under II, infra, as a matter of law there are, in this case, a multitude of "possibilities" whereby the state court could find that the collateral attack is justified.

II. THIS COURT SHOULD PASS ON THE ACCEPTABILITY OF A QUASI-LEGISLATIVE ANALYSIS FOR DETERMINING WHETHER ALREADY INJURED NAMED PLAINTIFFS MAY EXTINGUISH THE UNACCRUED FUTURE CLAIMS OF ABSENT PERSONS.

Even if federal removal jurisdiction somehow existed in the case (or if this Court were to decline to review that question), there would be a further question worthy of certiorari: under Fed. R. Civ. P. 23 and due process, in what circumstances (if any) may already injured named plaintiffs, in a Rule 23(b)(3) class action for money damages, contract to extinguish the unaccrued future claims of absent persons? This Court is currently considering similar issues in a related context, that of non-opt out, Rule 23(b)(2) class actions, in Ticor Title v. Brown, No. 92-1988. But the issues in this case merit review regardless of the outcome in Ticor Title.

As illustrated by Ticor Title and the several other major class action cases this Court has reviewed, the procedural standards governing the conduct of class actions are extremely important and affect large numbers of litigants.

The extent to which federal settlements of Rule 23(b)(3) class actions may bind individuals who are not even aware that they have suffered injury is an issue which this Court has never addressed and which is now of growing concern because of the great potential of these settlements to wreak havoc upon individual rights and due process.[43] This is particularly true in our complex technological society, in an era when tens of thousands of persons may become injured by toxic substances or dangerous products, but will not manifest observable harm until years later.

The concept of adjudicating or settling through a class action the interests of persons who are completely unaware of any injury, although they have been placed at risk in some

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[43] See, e.g., Carlough v. Amchem Prods., Inc. No. 93-1429, 1993 U.S. App. LEXIS 24930 (3d Cir. September 29, 1993) (discussing certification of 23(b)(3) class of future asbestos claimants); Dante v. Dow Corning Corp., 143 F.R.D. 136 at *4 (N.D. Ohio 1992) (conditionally certifying a nationwide 23(b)(3) class of future silicone breast implant claimants); In Re Breast Implant Litig., 1992 U.S. Dist. Lexis 10080, at *4 (May 21, 1992, N.D. Ohio) (amending class definition to include "persons who are likely to suffer or are at an increased risk of suffering any adverse medical condition as a result ... of having received a silicone gel breast implant"). See also **A141 - A147**, concerning the notice of settlement in the asbestos litigation.

manner by a potential defendant, is quite controversial in itself. As the Advisory Committee observed in an oft-quoted Note to the 1966 Amendments to the Federal Rules of Civil Procedure, "(a) 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action" because of the preponderance of individualized issues involved. Although class actions in the mass accident and even mass tort context have won increasing acceptance, they have almost always been limited to class members who have manifested some sort of perceptible injury, know that they may have a legal interest, and thus are in a position intelligently to evaluate whether to be part of a class action.

Binding persons to the results of a class action prosecuted by others when they do not know they have been injured and at most have an unaccrued future claim for injury is problematic on at least four levels. First is a concern about basic fairness. In the statute-of-limitations context, for example, this Court has

been unwilling to foreclose victims' legal interests based on "blameless ignorance," refusing to permit rights to lapse on the theory that people should be "charged with knowledge" of risks to which they have been unknowingly exposed. Urie v. Thompson, 337 U.S. 163, 169-170 (1949). This concern is compounded by the unavoidable conflict of interest between already injured plaintiffs and those who will develop illnesses in the future.[44]

Second is the issue of standing. Under Article III of the Constitution, it may be jurisdictionally improper to include persons who have manifested no perceptible injury in a personal injury class action.[45]

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[44] The former group of plaintiffs, and their attorneys, have a natural incentive to settle the claims of the latter at relatively low value, in order to make the settlement package as attractive as possible for the defendant. Indeed, this is precisely what happened in the Agent Orange litigation. See pp. 18, 19, supra.

[45] A hypothetical claim, like those of petitioners' in 1984, would appear not to have a "high degree of immediacy," Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2138 (1992), nor to be "certainly impending"; rather, such a claim seems merely "abstract" and too "conjectural or hypothetical" to confer standing. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (internal quotes and citations omitted). See also Phillips Petroleum v. Shutts, 472 U.S. 797, 804, (1985) ("Generally stated, federal standing requires an

Third, beyond the basic "case or controversy" question, the idea that federal judges should supervise the negotiation and final settlement of the substantive legal claims of absent persons before these claims have even accrued strains traditional concepts of the judicial role.[46]

Fourth, the due process concerns involved with including future claimants in a class

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allegation of a present or immediate injury in fact. . ."); Slaughter v. Levine, 598 F. Supp. 1035, 1040-1 (D.C. Minn. 1984) ("Each class member must have standing to bring suit in his own right."); Alexander v. Yale University, 631 F.2d 178, 183 (2nd Cir. 1978) (". . . a party seeking relief must establish that he or she has suffered 'distinct and palpable injury'"); Adashunas v. Negley, 626 F.2d 600, 604 (7th Cir. 1980) (it must clearly appear that all class members have "an actual case or controversy under Art. III of the Constitution"); McElhaney v. Eli Lilley & Co., 93 F.R.D. 875, 878 (D.C. S. Dak. 1982) (DES cases; "The definition of a class cannot be so broad as to include individuals who are without standing to maintain the action on their behalf"); and Barcelo v. Brown, 78 F.R.D. 531, 534 (D. P.R. 1978); ("the Court has serious doubts about its power to entertain the claims of . . . yet-to-come Plaintiffs", citing Art. III).

[46] An excellent benchmark for evaluating such a role is provided by the dissent in Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 110 S.Ct. 482, 489 - 492 (1989) (Scalia, J., joined by Rehnquist, C.J.). The dissenters argued that case management of future cases, involving known potential plaintiffs who would have to opt in to be bound, was "an extraordinary application of the federal judicial power," at odds with "a system in which courts are not inquisitors of justice but arbiters of adversarial claims." Id. at 489, 492.

settlement are just too overwhelming; in a cost/benefit analysis, the "costs", in terms of brutalizing individual rights, far exceeds the supposed "benefit" in obtaining settlements, particularly when that benefit is an undeserved windfall for the defendant. Ronald Hartman's affidavit makes it clear why this is true. **A74 to 97**. In Schweitzer v. Conrad, 758 F.2d 936 (3rd Cir. 1985), involving an asbestos class action, the court observed pertinently in discussing the inclusion of future claimants:

> "If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do. Requiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered.
>
> . . . It would be nearly as absurd under our facts to have expected plaintiffs, who allegedly had manifested no injury at the time of the reorganization proceedings, to file claims for such injury in those proceedings.

> Finally, an interpretation of 'interests' that included plaintiffs' future tort actions would raise constitutional questions. For example, the general rule is that all known creditors must receive personal notice. See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318-20, 70 S.Ct. 652, 659-60, 94 L.Ed. 865 (1950). But if the contingent claims were held to include possible future tort claims, then every hypothetical chain of future events leading to liability, regardless of how likely or unlikely, might be the basis for a contingent claim . . . We believe that our interpretation, which avoids such thorny constitutional issues, is the proper view of Congressional intent."[47]

758 F.2d at 943, 944.

Such concerns have led a number of commentators to argue that the difficulties inherent in analyzing the interest of those who do not yet know that they are injured, and particularly in notifying them of their rights, should preclude all class action settlements that seek to bind such persons.[48] Such an outcome is

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[47] See also In Re Amatek, 755 F.2d 1034, 1043 (3rd Cir. 1985) (holding that future claimants necessarily have a conflict with already injured claimants; at the very least the court must appoint an independent separate counsel for the future claimants in order to have any hope of attaining constitutional acceptance.)

[48] See, e.g., 3 Herbert B. Newberg & Alba Conte, Newberg on Class Action § 17.39, at 17-119 (3d ed. 1992) ("Anytime a mass tort gives rise to injuries that occur

certainly one option for this Court's consideration, but the principal attraction of the instant case is that it provides an excellent vehicle for any range of holdings - even a narrow one - in this Court's first consideration of the problem of class action absentee plaintiffs who lacked awareness of any injuries at the time of the class action settlement.

The basic due process requirements on which this Court has insisted for Rule 23(b)(3) class actions for money damages are well known: personal notice where possible, see Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 314-15, 319 (1950) and Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174 - 177 (1974) (requiring notice to all 2,250,000 members of that class because

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over a period of time ... inevitably there will be claims that arise in the future after an action for his mass tort has been permitted to be maintained and adjudicated as a class action. Those unaccrued future claims will not and cannot be bound by the class action litigation. Toxic torts giving rise to latent illnesses and defective products with latent risks are two examples."); Elizabeth R. Kaczynski, The Inclusion of Future Members in Rule 23(b)(2) Class Actions, 85 Colum. L. Rev. 397, 398 n.7 (1985) (the "future members cannot be included in (b)(3) actions.")

their names and addresses were ascertainable)[49]; notice that would expressly inform the purported class member that his or her status or situation (e.g. those with no perceptible injury at that time) was intended to be included within the class (see **A141-A147** for example of a better way to give notice to the future claimants); the right to opt out at the time when that decision has some meaning to the individual making the decision, see Shutts and cases cited at pp. 57 - 61, supra (in other words, in a personal injury class action, at a time when he or she has actually manifested some injury)[50]; and adequate representation, which, at a minimum and among other things, means by those who do not have a

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[49] Even if notice to every person who served in Vietnam and who might have been exposed to Agent Orange were not required in a class action involving only those who presently manifested injury, it certainly would be required under Eisen if the class purports to also include those who where exposed but had not manifested any injury.

[50] Such notice and opt-out rights are critical because they "protect (each) claimant's right to control her litigation." Arthur R. Miller & David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1 (1986). Cf. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-33 (1982) (holding that the right to adjudicative procedures is a species of property protected by the due process clause).

conflict of interest with those they seek to represent.[51]

On the record of this case, all these procedural protections were denied the future claimants in the 1984 Agent Orange litigation.[52]

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[51] It is academic that where the settlement negotiations may have been affected by collusion, bad faith, conflict of interest or an unfair trade-off the settlement is "impugned". Brown v. Ticor Title Ins. Co., 982 F.2d at 390; In Re General Motors, 554 F.2d 1106, 1133-1134 (7th Cir.) cert. denied 444 U.S. 870 (1979); Flinn v. FMC Corp., 528 F.2d 1169, 1173 (7th Cir. 1971); and Greenfield v. Villager Industries, Inc., 483 F.2d 824, 832 (3rd Cir. 1973).

[52] As discussed under the Statement of Case above, the named plaintiffs to the 1984 Agent Orange litigation who agreed to the ultimate settlement, all had already suffered "severe and permanent disabling injuries." See p. 12, 13, supra. These plaintiffs were obliged to sue prior to the expiration of the applicable statute of limitations, despite the paucity of the scientific evidence then available. As the district court acknowledged, the interests of petitioners and others who in 1984 were not suffering from any injury, were directly adverse to "the interests of presently injured plaintiffs as well as defendants in achieving a settlement." **A58**. The named plaintiffs made no effort to notify absent persons who were not suffering from injury. Rather, over defendant's objection, they and the district court defined, and directed notice to, a class consisting only of persons who subjectively believed that they were suffering compensable injuries as a result of Agent Orange. Then, once the opt out deadline had passed, the named plaintiffs vastly expanded the class that would be bound, to include anyone who might ever manifest any injury in the future. See pp. 17 - 18, supra. Conceivably, the Settlement Agreement might have expressly preserved the claims of these future plaintiffs; instead it abolished them. The district court's explanation for the parties' contractual agreement to extinguish the rights of hundreds of thousands of people, none of whom was at the bargaining table, was that the parties at the table were

Thus, petitioners were denied all of the bedrock requirements of Rule 23 and due process at the hands of private parties who negotiated to extinguish petitioners' legal claims before they had even accrued. This "might in another context be a bureaucratic success story," but here it has "serious constitutional ramifications." Morrison v. Olson, 487 U.S. 654, 684 (1988).[53]

The Second Circuit was likewise unwilling to enforce the minimum procedural guarantees applicable in the class action context. Despite the conflict of interest that the district court

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"(c)oncerned with the potential for new actions and recogniz(ed) the need for finality." A35. No notice and opt out rights for the future claimants were even considered.

[53] There are other potential due process transgressions which will be relevant in that portion of the merits - trial dealing with the collateral attack. These would certainly include the failure of the class counsel to have included, in the settlement agreement, the right to opt out by the future claimants within a reasonable period after they first manifest their injuries. As noted in Schweitzer, "(i)t would be absurd...to have expected plaintiffs, who ... had manifested no injury at the time,...to file claims for such injury...". 758 F.2d at 943, 944. The same is true of filing an opt out. Also see Kane v. Johns-Manville Corp., 843 F.2d 636, 640, 644, 645 (2nd Cir. 1988) (discussing settlement of future claimants' claims which gave future claimants the right to a full trial after they manifested their injuries.)

had candidly acknowledged, **A58**, the court below dismissed any concern here, with the assertion that harm from any conflict had "never materialized." But in this case, it did materialize and the consequences were clear. See pp. 24 - 25, supra. And in a bizarre reading of this Court's decision in Shutts, the court below opined, that as long as absent plaintiffs are unknown, a court may dispense with notice and opt-out rights entirely if it deems the benefits of these core protections to be "conjectural" and outweighed by "society's interest" in resolving complex litigation. See id.

The Second Circuit's focus on "society's interest" and its disregard for individual procedural guarantees may be acceptable in the legislative arena but cannot be squared with the functioning of a life-tenured judiciary. Cf. Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 444-45 (1915).

Thus, at its root, the second question in this case presents this Court with an opportunity to insist that the lower courts apply traditional

Rule 23 and due process analysis to the unaccrued future claims of absent plaintiffs, and an opportunity to reject the sort of quasi-legislative analysis relied upon by the Second Circuit.[54]

CONCLUSION

For all these reasons, certiorari should be granted.

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Houston, Texas 77002
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ATTORNEY FOR PETITIONERS

December 15, 1993

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[54] The lower courts, in dealing with the dismissal by Judge Weinstein, ignored summary judgment principles. Indeed, Ronald Hartman's uncontradicted affidavit and the undisputed procedural facts in this case permit but one reasonable conclusion and that is that inadequate notice, inadequate representation and absence of opt-out were all established as a matter of law with respect to the future claimants. At the very least, fact issues existed on those issues, thus mandating the denial of the motion to dismiss (in reality a "summary judgment motion"). See Adickes v. S. H. Kress and Co., 398 U.S. 144, 153-161 (1970).

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RONALD L. HARTMAN, KATHERINA H. HARTMAN, and as Next Friend to JEFFERY ALAN HARTMAN and ANGELA MARIE HARTMAN, Both minors individually; and LAURA JENKINS, Individually and as Representative of Eddie Jenkins, Deceased; PEGGY SANDS, Individually and as Representative of the Estate of Martin Sands; EMILE ANNIBOLLI; EARL THOMPSON and JUDY L. THOMPSON

Petitioners

v.

DIAMOND SHAMROCK CHEMICALS COMPANY; DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T H AGRICULTURE & NUTRITION COMPANY, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDICES TO HARTMAN PETITION FOR WRIT OF CERTIORARI (PAGES 72 - 148)

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UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

SHIRLEY IVY, Individually and as Representative of the Estate of DONALD IVY, Deceased, et al.,

Plaintiffs-Appellants,

V.

DIAMOND SHAMROCK CHEMICALS COMPANY, also known as Diamond Shamrock Refining & Marketing Company, et al.,

Defendants-Appellees.

DOCKET NO.: 92-7537, 92-7573

92-7575

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of September one thousand

nine hundred and ninety-three.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiffs-appellants, Ronald Hartman, Katherina H. Hartman, et al.,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,

ELAINE B. GOLDSMITH, Clerk
By: Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX H

STATE OF TEXAS §

COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, holding the position of Notary Public in and for the State of Texas, appeared RONALD L. HARTMAN, known to me, and, after first being sworn, did upon his oath, state, swear and affirm as follows:

My name is RONALD L. HARTMAN, I reside in Harris County, Texas. I am over twenty-one (21) years of age, of sound mind, and make this sworn statement on the basis of personal knowledge and of my own free will and accord.

I hereby state, swear and affirm as follows:

1. Neither I nor any member of my

family ever received any letter or other written notice, addressed to me or any member of my family concerning the existence of a class action involving the VietNam veterans, and their exposure to Agent Orange; nor was I or any member of my family ever advised in writing of our right to participate in such a class action: nor did I or any member of my family ever receive notice any right to opt out of such a class action. I understand that some written notices were mailed out in the Spring of 1984 concerning such alleged class action, including the notice of right to participate in such class action and/or to opt-out of such class action and I hereby state, swear and affirm that I did not ever receive a copy of such notice or notice of anything concerning such class

action.

2. Prior to 1988, neither I nor any member of my family ever saw an advertisement or received notice of any kind whatsoever, verbal, written or otherwise, from any source concerning the class action in Brooklyn, New York involving the VietNam veterans and their exposure to Agent Orange; I did not have any notice from any source concerning the existence of such class action, the right of me or my family to participate in such class action, or the obligation of me and my family to opt-out by a certain date or otherwise be bound by said class action.

3. I have recently been shown by my attorney, the notice of class action sent out by the Agent Orange Plaintiffs Management Committee in MDL 381, purporting to give notice of the

existence of such class action and or the potential rights of the members of the class, including the right to opt-out, which was sent out in the Spring of 1984. I can see that the definition of the class in that notice specifically stated that it included all those "injured" by exposure to Agent Orange in VietNam and did not say anything about the manifestation of injuries in the future or about those who at that time had no manifestation of injury, but who might manifest an injury in the future. Until the Spring of 1988 I had not manifested or experienced any ill effects of any kind whatsoever that could possibly be related to exposure to Agent Orange. I made adequate grades in English and I believe I understand the English language as well as the average person. Even if I

had received the notice of the class action which was sent out in the Spring of 1984, I would not have considered myself as having been put on notice of anything, or required to take any action or to have to opt-out by a certain date in order to be removed from the class action, because the definition of the class made it clear that it applied only to those who were "injured" at that time and did not say anything about veterans like myself who had served in VietNam and had been exposed to Agent Orange, but who had absolutely no injury, disorder, disease or malady, or any manifestation of such injury, disorder, disease or malady, at that time. It is shocking to me that the Chemical companies would now contend that I and other veterans like me, who served our Country faithfully in

VietNam, and who were not "injured" in the Spring of 1984, and who had no earthly idea that we might develop, in the future, some injury due to exposure to Agent Orange, would now be bound by what happened in a class action that all took place before we ever developed any manifestation of injury, and which class action had as a definition for its members one that referred only to those veterans who were "injured" (no one can deny that word is in the past tense) and which definition of the class made no reference to those who might manifest injury in the distant future (like some four years later, as in my case). I now state, swear and affirm that the definition of the class sent out in the Spring of 1984, even if I had seen it, would not have placed me upon notice that

I was included within the class or that I was obligated to take some action, such as opt-out, or be bound by such class. A copy of the Notice of the class, sent out in the Spring of 1984 and now shown me by my attorney is attached as Exhibit "A".

4. Furthermore, even if the definition of the class had expressly mentioned future claims, I don't know how anyone like myself, who, at that time, had no manifestation of any injury, disease or malady and was in good health and had no inkling whatsoever that he might develop some injury or disease in the distant future, could make an intelligent decision by May 1, 1984 as to whether or not he should opt out. After all, MDL 381 was a class action involving claims for personal injuries. If a person like myself is not injured at the

time he is forced to make a decision about opting-out, how in the world can he intelligently decide whether his injuries and his case is one that he wants to have tried individually or one that he wants to have resolved within the class. Obviously, if a person has nothing more than a skin disorder, he is more likely to stay in the class, than if he has a serious disease such as Non-Hodgkins Disease Lymphoma. Had I received notice of a class in 1984, which I did not, and had I had by then already manifested the disease of Non-Hodgkins Disease Lymphoma, I would have, in all probability, opted-out at that time. Because my disease is so serious, I would have wanted my case individually handled. But, as I said, I was in good health and had absolutely no reason to suspect that I might, four

years later, develop and manifest Non-Hodgkins Disease Lymphoma. Therefore, regardless of what the notice might have said, and even if it had expressly mentioned future claims, I still would not have felt that I had anything to worry about or any reason to make a decision about opting-out of a personal injury class that, I would have reasonably thought then, would never ever have any relevance to me whatsoever. Put another way, it is impossible for me, when I am not injured and have no reason to suspect that I might later develop an injury, to make an intelligent decision about what I should do with regard to a class action for those who are "injured". Until I became injured I just wouldn't be able to understand whats' really at stake, what I should do about opting-out

and what action I should take. I probably would not be able to get a lawyer at any time before I manifested an injury, to take my case on a contingent fee basis (since I would have no injury for which damages could be recovered out of which he could receive a fee) and I could not have financially afforded to pay a lawyer on any basis other than a contingent fee. Therefore, I probably would not in 1983-85, even if I had received the notice of the class, which I did not, have been able to get a personal lawyer to represent me and advise me about what I should do. And I certainly wouldn't have wanted to rely upon the class action lawyers, since the interests of the other clients, the "injured" VietNam veterans, was different from mine and the other unmanifested injury

veterans.

5. Also, prior to 1988, I never received notice of a proposed class settlement, either by mail or by any other source. I understand that a proposed class settlement was sent out in 1984. I have recently been shown a copy of that notice by my lawyer and, while it does mention those who might be injured in the future, since, in the Summer of 1984 when such notice was sent out, I was in good health and had no suspicion or even thought that I might develop Non-Hodgkins Disease Lymphoma four years later, I still would not have had any reasonable consideration that the proposed personal injury class settlement would in any way ever concern me. Therefore, I reasonably would not have even considered writing the Court or

appearing in person at the fairness hearings. In any event, since the notice of the proposed class settlement did not state that any veteran who did not favor the personal injury settlement could opt-out at that time, and all any veteran could do was to testify before the Court at the fairness hearings, it seems to me that the notice of proposed class settlement, even if I had received it, was really rather meaningless. This is true because despite the fact that the great majority of the VietNam veterans who had already manifested injuries opposed the settlement, the Court nevertheless approved it. Surely, the Court would not have paid much attention to a veteran who was not even injured at that time and had no reason to believe that he might manifest an injury in the

future. In any event, I can state, swear and affirm that the notice of proposed class settlement, had I received it, would have had no reasonable meaning to me because, at the time I would have received it (I repeat, I did not receive it or have any notice of it prior to 1988), I was in good health and had no reason to believe that I would ever be otherwise, insofar as my service in VietNam was concerned. The notice of proposed class settlement sent out in 1984, and personally shown to me by my attorney is attached as Exhibit "B".

6. I have also been recently shown by my attorney, a claim form that was sent out to all those who wanted to make claim against the settlement fund. Again, prior to 1988, neither I nor any member of my family ever received a copy

of that claim form, or ever saw one, or was ever advised by any source about the need to file such a claim form in order to receive compensation out of the class action settlement. Even if I had received a copy of such claim form in 1984 or 1985, when I understand they were sent out and by when I understand they had to be filed, since I was not "injured" at that time, and had no reason to believe I would ever manifest an injury by reason of my exposure to Agent Orange, as a reasonable person I would not have paid any attention to such claim form because it obviously is concerned with detailing the kind of injury that the veteran then has, its effects upon the veteran, whether it is totally disabling or not, and other information that essentially only applies to someone

already suffering from an injury.

7. I was diagnosed as having Non-Hodgkins Disease Lymphoma in March of 1988. Shortly thereafter I hired an attorney on a contingent fee, who advised me that theoretically, I had the right to make a claim against the settlement fund in MDL 381. That is the first time I became aware of that potential right. I was told about the maximum amount that I might recover from the settlement fund and it wasn't even enough to pay even a small amount of my medical bills and, even then, it would not be paid in a lump sum, but would be spread out over a number of years. In any event, I had, and still have, absolutely no interest in accepting the disgraceful amount which I might be able to receive out of the settlement fund and I not only refused to

even file a claim for benefits under the settlement fund, but I sent in my opt-out notice, advising the Court that I wanted to opt out of the entire class. That notice of opt out was sent in (by me) within a reasonable time after I was diagnosed in March of 1988, as having a disease, Non-Hodgkins Disease Lymphoma, which is probably caused by my exposure to Agent Orange. I now understand that the Chemical companies contend that I don't have a right to opt out of the class within a reasonable time after I, for the very first time, have found out that I have an "injury" that was probably caused by my exposure to Agent Orange. As a citizen of the United States and a veteran of the military conflict in VietNam, it is shocking to me that I and those veterans who have manifested injury

since May 1, 1984, don't have the same rights as those veterans who knew they were "injured" in May of 1984 - i.e. to opt out of the class at a time when they knew they were injured. I believe that if the Chemical companies are right, my constitutional rights have been violated because I was stripped of my cause of action at a time that I did not even know I might have one.

8. In addition to the fact that I was never given any notice, and certainly not meaningful notice, of the class action, the right to opt-out, or of the class settlement, I feel that I was not represented at all in the MDL 381 class action or, at the very least, I was not adequately represented. So far as I know, and I have certainly never been told or noticed otherwise from the Court,

the following is true: (a) the Court never appointed an attorney(s) separate, apart and independent from the members of the Agent Orange Plaintiffs Management Committee, who would have as his(their) sole responsibility the duty to represent the interests of the veterans who had not yet manifested injury; (b) I now state that it is obvious to me that the same attorneys who represent those who have already manifested injury, would have a conflict of interest with respect to representing those who had not yet manifested injury because the claims of those two groups are obviously in conflict and are too different in nature; therefore, it was essential in 1984 and 1985, when the settlement was being negotiated, consummated and the distribution plan adopted, for those of

us who had not yet manifested injury, to have an attorney(s) who represented solely our interests; (c) such independent attorney(s) should have been given the responsibility for seeing to it that the unmanifested injury veterans were treated fairly in the settlement negotiations and in the distribution plan, were given adequate notice of the proposed settlement and distribution plan (it is my understanding that no special effort was made to send the notice of the proposed settlement or distribution plan hearings to unmanifested injury veterans), and were given the same right that the manifested injury veterans had, namely to opt-out at a time when they knew the kind and extent of their injury, and such independent attorney(s) should have been given any and all authority

necessary to protect the rights and interests of the unmanifested injury veterans; (d) I have seen the distribution plan decision and it is obvious to me that the unmanifested injury veterans did not get treated equally or as well as the manifested injury veterans were treated; (e) the Agent Orange Plaintiffs Management Committee did not bother to give the unmanifested injury veterans any notice of the class action, of the initial right to opt-out of the class settlement, of the fairness hearings, of the hearings on the distribution plan, of the hearings on the attorneys fees, or any other matter relevant to the class proceedings and any rights that the unmanifested injury veterans might have in the class action and under the proposed settlement; (f)

most of all, the Agent Orange Plaintiffs Management Committee did not bother to arrange for the unmanifested injury veterans to have the express right to opt-out within a reasonable time after each of us manifested an injury in the future; (g) and I now state that the Agent Orange Plaintiffs Management Committee did not adequately represent me, the unmanifested injury veteran, the manifested injury veterans or any of the VietNam veterans because; they agreed to a settlement without knowing the number of claims or having any earthly idea what the number of claims were; after they found out that the present claims were over 245 thousand in number, the majority of them failed to notify the Court that they were terminating the settlement; they agreed to an amount that was grossly

inadequate when compared to the potential total of the claims; and the prior management committee negligently waived elements 1 and 2 of the military contractor defense, concerning which the Plaintiffs could have, I am told by my attorney, at least generated fact issues and thus precluded the Court of Appeals from finding that the settlement was fair and reasonable only because the Plaintiffs could not have recovered anything in the face of the military contractor defense.

For all of the foregoing reasons, and for all others that might be perceived from the record in MDL 381 to date, the attorneys who represented the class in MDL 381 did not adequately represent the interests of the unmanifested injury veterans, including

myself.

9. All I want - and I think I am constitutionally entitled to it - is for this Court to honor my right to opt-out, which I exercised within a reasonable time after I manifested an injury, so that I can have my case individually adjudicated in a Court of law. I also want the Court to send my case back to the state courts here in Texas where I live and where I am being treated for my cancer. In asking for these two things, I do not believe I am asking too much. I am only asking for what I am entitled to under the Constitution of the United States and our laws as an American citizen and a veteran of the VietNam War.

SIGNED THIS the 5th day of March, 1991.

S/RONALD L. HARTMAN
RONALD L. HARTMAN

SWORN TO AND SUBSCRIBED before me, the

undersigned authority, on the 5th day of March, 1991.
S/Lois M. Lande
Notary Public in and for the
State of Texas

My Commission expires: 3/13/92

APPENDIX I

NO. 90-11853

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

152ND JUDICIAL DISTRICT

RONALD L. HARTMAN and KATHERINA H. HARTMAN and as Next Friend of JEFFERY ALAN HARTMAN and ANGELA MARIE HARTMAN, BOTH MINORS, Individually and as Representatives of Those Similiarly Situated,

PLAINTIFFS

vs.

DIAMOND SHAMROCK CHEMICALS COMPANY, a/k/a DIAMOND SHAMROCK REFINING & MARKETING COMPANY and a/k/a OCCIDENTAL ELECTRO CHEMICAL CORPORATION and a/k/a MAXUS ENERGY CORPORATION and a/k/a DIAMOND SHAMROCK COMPANY; and THE DOW CHEMICAL COMPANY; MONSANTO COMPANY, UNIROYAL INC.;

HERCULES INC.; THOMPSON-MAYNARD CHEMICAL COMPANY, a/k/a THOMPSON CHEMICAL CORPORATION; and T.H. AGRICULTURE & NUTRITION COMPANY, INC.,

DEFENDANTS.

PLAINTIFFS' ORIGINAL PETITION

COMES NOW RONALD L. HARTMAN and KATHERINA H. HARTMAN, Individually and as Next Friend of JEFFERY ALAN HARTMAN and ANGELA MARIE HARTMAN, BOTH MINORS, hereinafter referred to as Plaintiffs, complaining of DIAMOND SHAMROCK CHEMICALS COMPANY a/k/a DIAMOND SHAMROCK REFINING & MARKETING COMPANY and a/k/a OCCIDENTAL ELECTRO CHEMICAL CORPORATION a/k/a MAXUS ENERGY CORPORATION a/k/a OCCIDENTAL CHEMCIAL CORPORATION and a/k/a DIAMOND SHAMROCK COMPANY; THE DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD

CHEMICAL COMPANY a/k/a THOMPSON CHEMICALS CORPORATION; and T.H. AGRICULTURE & NUTRITION COMPANY, INC., hereinafter referred to as "Defendant CHEMICAL COMPANIES", and for cause of action would respectfully show the Court as follows, to-wit;

I.

Plaintiffs are resident citizens of Harris County, Texas. The Defendants are various chemical manufacturers and may be served with process as follows:

A. Diamond Shamrock Chemicals Company a/k/a Diamond Shamrock Refining & Marketing Company (formerly Diamond Shamrock Corporation) and a/k/a Occidental-Electro Chemical Corporation and a/k/a Occidental Chemical Corporation and a/k/a Maxus Energy Corporation and a/k/a Diamond Shamrock Refining and

Marketing Company and a/k/a Diamond Shamrock Company, will all be referred to as the "DIAMOND SHAMROCK Defendants". Diamond Shamrock Chemicals Company was the name of the company that manufactured Agent Orange in the 1960's. That company may have been absorbed by any one of the following: Diamond Shamrock Refining & Marketing Company, Diamond Shamrock Company, Occidental-Electro Chemical Corporation, Occidental Chemical Corporation and/or Maxus Energy Corporation. Plaintiffs would show that all the above entities have their home offices in Texas, as follows:

1. Occidental Chemical Corporation
   World Headquarters
   5008 LBJ Freeway
   Dallas, Texas 75244

2. Occidental-Electro Chemical
   Corporation
   5008 LBJ Freeway
   Dallas, Texas 75244

3. Maxus Energy Corporation
717 Harwood St.
Dallas, Texas 75231

4. Diamond Shamrock Refining & Marketing Company and Diamond Shamrock Company
9830 Colonnade Blvd.
San Antonio, Texas 78230

All said entities may be served with process as follows:

a. Diamond Shamrock Chemicals Company through Diamond Shamrock Refining & Marketing Company Company:

Mr. John Cottles
9830 Colonnade Blvd.
San Antonio, Texas 78230
(Agent For Service)

b. Diamond Shamrock Chemicals Company through Occidental-Electro Chemical Company:

C. T. Corp.
1601 Elm St.
Dallas, Texas 75201
(Agent For Service)

c. Diamond Shamrock Chemicals Company through Occidental Chemicals Company:

C. T. Corp.
1601 Elm St.
Dallas, Texas 75201
(Agent For Service)

d. Diamond Shamrock Chemicals Company through Maxus Energy Corporation:

C. T. Corp.
1601 Elm St.
Dallas, Texas 75201

All said corporations do business in Texas.

B. Dow Chemical Company is a corporation with its principal place of business in Midland, Michigan, but is authorized to do business in Texas and may be served with process by serving its registered agent for service as follows:

C.T. Corporation
1601 Elm St.
Dallas, Texas 75201

Said Defendant, The Dow Chemical Company, does business in Texas.

C. Monsanto Company has its principal place of business in St. Louis, Missouri but is authorized to do business in Texas and may be served with process

by serving its registered agent for service as follows:

C. T. Corporation
1601 Elm St.
Dallas, Texas 75201

Said Defendant, Monsanto Company, does business in Texas.

D. Uniroyal, Inc. has one of its principal places of business out of state, but is authorized to do business in Texas and may be served with process by serving its registered agent for service as follows:

Prentice Hall Corp.
807 Brazos, Suite 102
Austin, Texas 78701

Said Defendant, Uniroyal, Inc., does business in Texas.

E. Hercules, Inc. has its principal place of business out of state and has no office in Texas or official agent for service in Texas but is doing business in

Texas and may be served with process by having the Secretary of State mail process, Certified Mail, Return Receipt Requested to its registered agent for service: Hercules, Inc. c/o Ellen Kensler, P. O. Box 631, Wilmington, Delaware 19899. Defendant Hercules, Inc. does business in Texas.

F. Thompson-Hayward Chemical Company, a/k/a Thompson Chemicals Corporation has one of its principal places of business out of state but is authorized to do business in Texas and may be served with process by serving its registered agent for service as follows:

C. T. Corporation
1620 Elm St.
Dallas, Texas 75201

Said Defendant, Thompson-Hayward Chemical Company, a/k/a Thompson Chemicals Corporation does business in Texas.

G. T.H. Agriculture & Nutrition Company, Inc., has no office and no agent for service in Texas so far as we know, but is doing business in the State of Texas, and may be served with process through the Long-Arm Statute, Chapter 17 of the Civil Practices and Remedies Code, by having the Secretary of State mail citation, Certified Mail, Return Receipt Requested, to its home office address as follows:

T.H. Agriculture & Nutrition
Company, Inc.
100 E. 42nd
New York, New York 10174

II.

This suit involves serious injuries to the Plaintiffs arising out of the service of RONALD L. HARTMAN during the Vietnam conflict. RONALD L. HARTMAN was a member of the United States Air Force, rank E-4, Sergeant, while he served in

Vietnam between December, 1967 and December, 1968. Starting about 1963 and throughout the Vietnam conflict, and at least to and through 1971, the United States Armed Forces purchased from the seven Defendants in this case, namely DIAMOND SHAMROCK CHEMICALS COMPANY, THE DOW CHEMICAL COMPANY, MONSANTO COMPANY, UNIROYAL, INC., HERCULES, INC., THOMPSON CHEMICALS CORPORATION, and T.H. AGRICULTURE & NUTRITION COMPANY, INC., (hereinafter referred to as "Defendant CHEMICAL COMPANIES"), chemical herbicides for the primary purpose of destroying the jungle which was being used by the Viet Cong as cover for ambushing American troops. In addition, the herbicide was purchased and used for destroying the food crops of the enemy in possible violation of the Geneva Convention on the

use of poisons. In any event, the primary herbicide used was a herbicide known as "Agent Orange", which was an approximate 50-50 mixture of 2,4-D and 2,4,5-T. Tragically, such herbicide contained, as a by-product of the manufacturing process, one of the most toxic chemicals known to man, a compound commonly referred to as TCDO or "dioxin".

III.

This suit is brought solely under state law. Plaintiffs are suing under state common law, state products law, state Deceptive Trade Practices Act, state actual damages and state punitive damages. Plaintiffs do not assert any rights or seek recovery under any federal law.

IV.

RONALD L. HARTMAN and other

servicemen and women were, during their service in Vietnam, repeatedly exposed to the Agent Orange. It was not only used in combat areas but it was sprayed and disposed of in such a manner that it got into the air, water systems and waterways, the soil, food crops and vegetation and its residual cans were used to store gasoline so that automobiles and other vehicles traveling in Vietnam gave off exhaust fumes containing Agent Orange. RONALD L. HARTMAN and other American servicemen and women absorbed the deadly chemical through the air, through the skin and by ingesting same through water and food.

V.

The Agent Orange to which the Plaintiff RONALD L. HARTMAN was exposed was defectively designed, formulated,

manufactured and marketed by the Defendant CHEMICAL COMPANIES. As designed, formulated, manufactured and marketed, such product was unreasonably dangerous and not fit for the purposes intended. Plaintiffs invoke Sections 402(a) and 402(b) of the Restatement of Torts and assert that the product in question was defective and unreasonably dangerous pursuant to such sections. Moreover, the Defendant CHEMICAL COMPANIES breached the express and/or implied warranties running with the fitness of such product, particularly with respect to the design, formulation, manufacturing and marketing of said product. Plaintiffs hereby adopt the doctrine of strict products liability. Plaintiffs would show that the defective and unreasonably dangerous nature of said

products, and the breaches of warranties with respect to the sale of said products, were a producing and/or proximate cause of the damages hereinafter asserted.

VI.

Plaintiffs would further show that the Defendant CHEMICAL COMPANIES violated the provisions of Section 2.725 of the Texas Business and Commerce Code Annotated (Vernon 1968) by reason of the breaches of warranty and merchantability with regard to the design, formulation, manufacture and sale of said Agent Orange. The violation of such statute was also a producing and/or proximate cause of the damages and injuries hereinafter asserted.

VII.

In addition, your Plaintiffs would

show that the Defendant CHEMICAL COMPANIES were guilty of negligence, as that term is defined in state law, in the manner in which they designed, formulated, tested, manufactured and marketed the Agent Orange in question. Among other acts of negligence, the Defendant CHEMICAL COMPANIES were negligent in failing to properly test the Agent Orange for its long term effects before placing such chemical agent upon the market; in formulating and designing a product which contained a highly toxic by-product such as dioxin; in failing to correct the manufacturing process so as to be able to manufacture a suitable herbicide without having the by-product dioxin in it; in negligently manufacturing Agent Orange so as to create the deadly by-product dioxin; in

marketing such product in such a manner as to fail to warn the known users of said product namely those who bravely fought for our country in Vietnam, of the dangers and hazards incident to exposure to said product; in failing to adequately warn the United States Government of all the hazards and dangers of said product; in failing to medically monitor those who were exposed to said product and to adequately warn the Plaintiffs of the medical dangers after exposure; in failing to warn about, and suggest the use of, prophylactic and other protective gear by those who were exposed to said product in Vietnam; in failing to warn and seek to bring about the spraying, dispersal and use of said product in such a manner as to render it as safe as possible for those who might be exposed

to it and to reduce the direct exposure of the American service persons to such products; in failing to use alternative herbicides that did not contain the toxic qualities that Agent Orange contained; and said Defendant CHEMICAL COMPANIES were negligent in many other respects with respect to the design, formulation, manufacturing, marketing, testing and use of Agent Orange in Vietnam. All the foregoing acts of negligence, both those specifically alleged and any others that may have been committed, were a proximate cause of the injuries and damages hereinafter alleged.

VIII.

As a proximate and producing result of being exposed to Agent Orange in Vietnam, the Plaintiff RONALD L. HARTMAN carried in his body substantial and

significant quantities of dioxin and other toxic chemicals found in Agent Orange, particularly in his fatty tissues. These deadly compounds have wreaked tragic havoc upon RONALD L. HARTMAN and his family. In the latter part of March of 1988, the Plaintiff RONALD L. HARTMAN was diagnosed as having non-hodgkin's disease lymphoma, a deadly cancer known to be caused by exposure to dioxin and other chemicals in the Agent Orange. In connection with the disease of lymphoma, Plaintiffs would show that a recent study by the Veterans Administration establishes that Vietnam Veterans exposed to Agent Orange have a 110% higher incidence of lymphoma than the non-exposed population. The diagnosis of the lymphoma disease then caused the Plaintiffs, in the exercise of

reasonable diligence, to discover in the latter part of March of 1988, that the birth defects in their two children, JEFFERY ALAN HARTMAN and ANGELA MARIE HARTMAN, had been caused by RONALD L. HARTMAN's exposure to Agent Orange in Vietnam. The Plaintiff KATHERINA H. HARTMAN, the wife of RONALD L. HARTMAN has been caused to suffer and sustain, as a result of her husband's disabilities and the tragic effects upon her children, mental anguish, loss of consortium and other damages. All of the foregoing maladies have caused the Plaintiffs, RONALD L. HARTMAN, KATHERINA H. HARTMAN, JEFFERY ALAN HARTMAN and ANGELA MARIE HARTMAN, to suffer and sustain extreme mental anguish, physical pain, disability, disfigurement, loss of earnings, loss of earning capacity in the

future, to incur medical expenses in the past and in the future, to incur medical expenses in the past and in the future and to suffer other actual damages both now and in the future. These damages are substantial and, suffice it to say, they far exceed the minimum jurisdiction of this Court and amount to no less than Fifteen Million ($15,000,000.00) Dollars for the named Plaintiffs. However, your Plaintiffs hereby sue for whatever amount the jury and this Court may determine to be the reasonable actual damages, which were the proximate and producing result of the defective Agent Orange product and the negligence of the Defendant CHEMICAL COMPANIES, all as alleged above.

IX.

In addition, your Plaintiffs are entitled to penalty damages under the

Texas Deceptive Trade Practices Act, Sect. 17.41 of the Texas Business and Commerce Code. The Defendant CHEMICAL COMPANIES made express and implied representations, warranties and assurances concerning the health and safety of those exposed to Agent Orange. The Defendant CHEMICAL COMPANIES breached these warranties and other representations and, in effect, made deceptive representations to the United States Government and the servicemen exposed to Agent Orange in Vietnam concerning the safety and quality of the product in question. Those misleading and deceptive representations constituted deceptive trade practices as that term is defined in the Texas Deceptive Trade Practices Act and the perpetration of such deceptive trade practices upon the

United States Government and the Vietnam Veterans and their families proximately caused and produced serious and permanent injuries to the Plaintiffs herein. By reason of the violation of the Texas Deceptive Trade Practices Act your Plaintiffs are entitled to treble and other penalty damages, an amount of reasonable attorneys fees, said amount being no less than Five Hundred Thousand ($500,000.00) Dollars; costs of court; and other penalties provided for by the said Texas Deceptive Trade Practices Act. Plaintiffs agree to abate these proceedings for sufficient time as may be necessary to satisfy the procedural requirements of the Deceptive Trade Practices Act.

X.

Moreover, your Plaintiffs sue for

punitive and exemplary damages in this case. There has never been a situation in the annals of the judicial history of this country that is more deserving of the imposition of punitive and exemplary damages than this case. This case involves brave men and women who served our country in an unpopular war and, despite the unpopularity of the war, answered the call of our country to do their duty. When the Defendant CHEMICAL COMPANIES sold Agent Orange to the United States Government, as the evidence will show, they knew that it contained a deadly contaminant known as dioxin. They knew that exposure to Agent Orange and such contaminant by servicepersons would cause them serious injuries, illnesses, birth defects in their children and such deadly diseases as cancer. Despite

knowing this, early in the Vietnam War the Defendant CHEMICAL COMPANIES met at Midland, Michigan and conspired to keep such information from the United States Government for the expressed reasons that they feared Congressional investigations and that they might lose the sales of the product to the United States Government and thus the tremendous profits they were making off the taxpayers. They entered into this willful conspiracy in calloused and complete indifference to the safety of those people who bravely served our country in Vietnam. Their conduct was reckless, willful, malicious, calloused, indifferent to the safety of human beings, and is the kind of conduct that deserves to be punished and punished severely. Plaintiffs come now and sue for the maximum amount of punitive

damages they could possibly be awarded under the law of this state against the Defendant CHEMICAL COMPANIES. Moreover, substantial exemplary damages should be awarded in order to deter similar conduct on the part of other chemical companies in the future. The amount of punitive damages should be whatever the Jury and this Court deem appropriate, but certainly should be no less than Fifty Million ($50,000,000.00) Dollars for the named Plaintiffs.

XI.

Plaintiffs hereby invoke the terms and provisions of Rule 42 of the Texas Rules of Civil Procedure. Plaintiffs hereby request the Court to certify a class action which shall be defined as follows:

> "All those Vietnam Veterans and members of their family who either:

(1) after May 1, 1984, maifested symptoms of injuries, diseases or other maladies which were at least in part caused by the Vietnam Veterans' exposure to Agent Orange in Vietnam or (2) those who, despite the exercise of reasonable diligence, did not discover that injuries, diseases or other maladies, which existed prior to May 1, 1984, had in fact been caused or contributed to by the Vietnam Veterans' exposure to Agent Orange in Vietnam. This class does not include any injuries, diseases or maladies which the Vietnam Veterans or members of such veterans' families had before May 1, 1984 and which were, in the exercise of ordinary diligence, discovered to have been caused by the Vietnam Veterans' exposure to Agent Orange in Vietnam before May 1, 1984.

Plaintiffs would show that all prerequisites of Rule 42 are and have been met; that the Plaintiffs are sufficient, competent and acceptable for representing the class so defined; that the class action will protect those servicepersons who might otherwise fall victim to the Statute of Limitations;

that the class action is the most manageable way of handling the litigation at this juncture in the history of all the Agent Orange litigation; your Plaintiffs now generally assert that all elements and criteria with respect to class action treatment of this litigation have been satisfied and/or can be met. The class members have suffered actual and punitive damages in excess of the minimum jurisdiction of the Court and the amount thereof will be specified at an approximate time in the future.

XII.

Your Plaintiffs would show that all procedural requirements of all phases of this suit, including the Deceptive Trade Practices Act, as well as class action allegations, have been met in full.

XIII.

Moreover, your Plaintiffs come now and sue for pre-judgment interest as provided for by the law of the State of Texas.

XIV.

In addition, your Plaintiffs' class, once certified, requests the Court to create an adequate fund, paid for by the Defendants, to be used to medically monitor for the next twenty years all Vietnam Veterans who were exposed to Agent Orange. It is requested by Plaintiffs that this fund be created and controlled by a Master appointed by this Court to administer such funds; that the Master, with the assistance of the parties, create a protocol for the monitoring of the Vietnam Veterans to try to determine, at the earliest possible date, the existence of any other

symptoms, maladies, diseases, injuries or deaths that might have resulted from exposure to Agent Orange and to assist in bringing about immediate treatment of those diseases, maladies and injuries; and to generally use such funds to pay the costs for such monitoring expenses. Plaintiffs would show that the Court has the power in equity and law to create such a fund; that absent the creation of such a fund the Vietnam Veterans will have no adequate remedy at law and will suffer irreparable harm.

WHEREFORE, PREMISES CONSIDERED, your Plaintiffs pray for all of the actual damages asserted above; penalty damages as provided for under the Deceptive Trade Practices Act; punitive and exemplary damages; attorneys fees; pre-judgment interest; costs of court; class action

treatment; the creation of a medical monitoring fund; and such other and further relief to which they may show themselves justly entitled to receive.

Respectfully submitted,

S/ KELLY L. NEWMAN
By: KELLY L. NEWMAN
Attorney-at-Law
SBOT No. 1461000
350 North Belt
Houston, Texas 77060
713/448-1173

APPENDIX J

Civil Action No. H-90-1571

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

RONALD L. HARTMAN and KATHERINA H. HARTMAN and as Next Friend of JEFFERY ALAN HARTMAN and ANGELA MARIE HARTMAN, BOTH MINORS Individually and as Representatives of Those Similarly Situated Plaintiffs

vs.

DIAMOND SHAMROCK CHEMICALS COMPANY, a/k/a DIAMOND SHAMROCK REFINING & MARKETING COMPANY AND a/k/a/ OCCIDENTAL ELECTRO CHEMICAL CORPORATION and a/k/a MAXUS ENERGY CORPORATION and a/k/a OCCIDENTAL CHEMICAL CORPORATION; and a/k/a DIAMOND SHAMROCK COMPANY; and THE DOW CHEMICAL COMPANY; MONSANTO COMPANY;

UNIROYAL INC.; HERCULES INC.; THOMPSON-HAYWARD CHEMICAL COMPANY, a/k/a THOMPSON CHEMICALS CORPORATION; and T. H. AGRICULTURE & NUTRITION COMPANY, INC.

Defendants

NOTICE OF REMOVAL

Defendants Diamond Shamrock Chemicals Company (referred to in the plaintiffs' petition as a/k/a Diamond Shamrock Refining & Marketing Company, a/k/a Occidental Electro Chemical Corporation, a/k/a Maxus Energy Corporation, a/k/a Occidental Chemical Corporation, a/k/a Diamond Shamrock Company); The Dow Chemical Company; Monsanto Company; Uniroyal Inc.; Hercules Inc.; Thompson Chemicals Corporation; Thompson-Hayward Chemical Company; and T.H. Agriculture & Nutrition Company, Inc., for their Notice of Removal allege

as follows:

I.

On or about March 12, 1990, plaintiffs filed a petition in the District Court of Harris County, Texas entitled Ronald L. Hartman et al. v. Diamond Shamrock Chemicals Company et al., No. 90-11853. A copy of the petition is attached hereto as Exhibit A. In this action, plaintiff Ronald L. Hartman alleges that while serving in the United States armed forces in Vietnam he was exposed to chemical herbicides used by the armed forces to defoliate portions of the jungle, and that the principal herbicide, known as Agent Orange, was manufactured by the defendants and has caused serious injury to plaintiff, his family and the class of persons similarly situated.

II.

Plaintiffs' petition is virtually identical to a petition filed by the same plaintiffs against the same defendants in June 1988 in the District Court of Jefferson County, Texas. A copy of plaintiffs' 1988 petition is attached hereto as Exhibit B. That action was removed to federal court and transferred to the Eastern District of New York by the Judicial Panel on Multidistrict Litigation. A copy of the Judicial Panel's transfer order is attached hereto as Exhibit "C". Plaintiffs thereafter requested that the action be dismissed and the action was accordingly dismissed without prejudice by the Honorable Jack B. Weinstein, the multidistrict transferee judge assigned to all Agent Orange matters under M.D.L. No. 381. A

copy of plaintiffs' letter request for dismissal without prejudice and Judge Weinstein's endorsed order thereon is attached hereto as Exhibit "D".

III.

In June 1989, an action entitled Shirley Ivy et al. v. Diamond Shamrock Chemicals Co. et al. was instituted in the District Court of Jefferson County, Texas. That action is virtually identical to the Hartman action. It purports to be a class action on behalf of those individuals whose alleged injury due to exposure to Agent Orange manifested itself after May 1, 1984 and alleges the same causes of action against the same list of defendants. A copy of the original petition in that action is attached hereto as Exhibit "E". That action was removed to federal court and

transferred to the Eastern District of New York for inclusion in MDL 381 by the Judicial Panel on Multidistrict Litigation. Plaintiffs petitioned the Second Circuit Court of Appeals for a writ of mandamus to compel the MDL Panel to vacate its transfer order. The petition was denied on March 28, 1990 and the action is currently pending in New York.

IV.

All actions in which parties have sought compensation for injuries allegedly caused by exposure to herbicides such as Agent Orange used by the United States military in Vietnam have been transferred by the Judicial Panel on Multidistrict Litigation to the United States District Court for the Eastern District of New York for

consolidated or coordinated pretrial proceedings under MDL 381. In sum, more than 600 actions filed in state and federal courts have been transferred to MDL 381. Immediately after filing this notice, defendants' counsel will notify the Judicial Panel or Multidistrict Litigation of the existence of this Agent Orange "tag-along" action and request that it too be transferred to MDL 381.

V.

The MDL 381 transferee court certified the claims of all veterans and their family members who were allegedly injured by exposure to Agent Orange as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The Agent Orange class action was settled on May 7, 1984, and the class action settlement was confirmed on appeal. In

re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004, 108 S. Ct. 695 (1988). The claims of plaintiffs who opted out of the class action before the opt-out deadline, May 1, 1984, and who filed independent actions were dismissed pursuant to defendants' motion for summary judgment. In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 187 (E.D.N.Y. 1985), aff'd, 818 F.2d 187 (2d Cir. 1987), cert. denied, _____ U.S. _____, 108 S.Ct. 2898 (1988). Plaintiffs allege in this action -- as they did in their original petition, and as did the plaintiffs in the Ivy action -- that they are not bound by that judgment because they did not discover their claims until

after the class action settlement. However, the claims of such plaintiffs were encompassed by the class action settlement and objections to the inclusion of such claims within the "Agent Orange" class were asserted on appeal and were rejected by the affirmance of the class action settlement in the United States Court of Appeals for the Second Circuit. 818 F.2d 145 (2d Cir. 1987).

VI.

This Court has original jurisdiction over this action because plaintiffs' claims have already been asserted and adjudicated in federal court and plaintiffs' petition is merely an artful pleading to avoid federal jurisdiction.

VII.

This Court also has original

jurisdiction over this action pursuant to 28 U.S.C. § 1331 based on the doctrine of complete federal preemption. See, e.g., Caterpillar Inc. v. Williams, 482 U.S. 386 (1987); Boyle v. United Technologies Corp., 487 U.S. 500, 108 S.Ct. 2510 (1988).

VIII.

Based on the foregoing, this Court has original jurisdiction over this action under 28 U.S.C. § 1331 and this action is properly removable under 28 U.S.C. § 1441.

IX.

This notice of removal is timely filed pursuant to 28 U.S.C. § 1446(b); written notice of the filing of this notice will be served on all adverse parties; and a copy of the notice will be filed with the Clerk of the District

Court of Harris County, Texas. Defendants herewith file a true copy of all process, pleadings and orders served upon defendants in such action, the same consisting of Plaintiffs' Original Petition filed in the District Court of Harris County, Texas.

X.

Defendants have specifically authorized the firms of Rivkin, Radler, Bayh, Hart & Kremer and Mehaffy, Weber, Keith & Gonsoulin to represent them for the purpose of removing this action to this Court.

Dated: May 10, 1990

MEHAFFY, WEBER, KEITH & GONSOULIN

By Q.J. WEBER, of Counsel State Bar No. 21048000, P.O. Box 16, Beaumont, TX 77044

409/835-5011

SDOT# 8310

RIVKIN, RADLER, BAYH, HART & KREMER

By LEONARD L. RIVKIN, of Counsel

JOSEPH J. ORTEGO

STANLEY PIERCE

EAB Plaza

Uniondale, New York 11556-0111

(516) 357-3000

ATTORNEYS FOR DEFENDANTS

TO: KELLY L. NEWMAN, Attorney for Plaintiffs

SBOT No. 1461000

350 North Belt

Houston, Texas 77060

(713) 448-1173

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument has been forwarded to all counsel of record on this the 14th day of

May, 1990.

O.J. WEBER

APPENDIX K

ATTENTION

ALL PERSONS WHO HAVE WORKED WITH OR AROUND ASBESTOS OR ASBESTOS-CONTAINING PRODUCTS (WHETHER OR NOT CURRENTLY SUFFERING FROM AN ASBESTOS-RELATED MEDICAL CONDITION) THEIR SPOUSES, HOUSEHOLD AND FAMILY MEMBERS, AND LEGAL REPRESENTATIVES

The Houston Post, Sunday, December 5, 1993

Your rights may be affected by the settlement of a class action lawsuit pending in the United States District Court for the Eastern District of Pennsylvania. PLEASE READ THIS NOTICE CAREFULLY AND CALL 1-800-847-2727 FOR MORE INFORMATION.

DESCRIPTION OF LAWSUIT AND SETTLEMENT

Certain individuals have brought a

class action lawsuit entitled Carlough v. Amchem Products Inc. et al., CA. No. 93-CV-0215 (E.D.Pa.), seeking personal injury damages as a result of occupational exposure to asbestos against the following 20 defendant companies:....

The individuals bringing the lawsuit seek damages both for themselves and for a class of other similarly situated persons. The Court has conditionally certified that class solely for purposes of a possible settlement of the lawsuit. The counsel listed at the bottom of this Notice have been appointed as Class Counsel.

A proposed Settlement sets up a system to compensate class members who meet certain asbestos exposure requirements if and when they develop certain asbestos-related medical

conditions. Compensation will also be available in death cases.

Compensation amounts reflect amounts paid by the 20 defendant companies to similar claimants whose cases have been settled.

A hearing will be held by the Court in Courtroom 11A, U.S. Courthouse, Philadelphia, Pennsylvania, on February 22, 1994, to determine whether the proposed Settlement should be approved by the Court as fair, reasonable, and adequate.

If the Settlement is approved by the Court, it will settle all claims for asbestos-related personal injury (including claims based on premises ownership or vicarious liability) against the 20 defendant companies by all members of the class who do not exclude

themselves from the class. Claims settled will include 1) personal injury, damage or death and all forms of mental or emotional harm; 2) loss of support, services, consortium, companionship, society and other valuable services made by spouses, parents, children or other relatives (including wrongful death and survival actions); 3) punitive, aggravated, or exemplary damages of any sort.

WHO IS A MEMBER OF THE CLASS?

1. All persons (or their legal representatives) who have been exposed occupationally, or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the 20 defendant companies may bear legal liability, but who had

not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injuries against one or more of those companies....

If you are covered by this definition, you are a class member, whether or not you are presently suffering from an asbestos-related medical condition.

CONSEQUENCES OF CLASS MEMBERSHIP

If you are a member of the class and wish to remain a class member, you need to do nothing further at this time. If you remain in the class and a Settlement is approved by the Court, you will get the benefit of that Settlement. By remaining in the class you will have accepted these procedures as the only means of resolving claims based on asbestos-related personal injury or

damage against the 20 defendant companies.

REQUESTS FOR EXCLUSION

If you want to be excluded from the class, you must fill out an "Exclusion Request," and return it to the Court at the address listed in that form no later than January 24, 1994. (Directions for obtaining an "Exclusion Request" are outlined below). If you exclude yourself from the class, you will not get the benefit of a Settlement. You may, however, pursue any claims for asbestos-related personal injury or damage against the 20 defendant companies by filing your own lawsuit at your own expense through the usual court procedures.

APPEARANCE BY COUNSEL

The Class Counsel identified below will act as your counsel in this class

action at no expense to you; however, you may also have your own attorney appear in this action on your behalf and at your own expense.

OBJECTIONS TO SETTLEMENT

Class members may object to the proposed Settlement, either on their own or through counsel. Written objections must be filed with the Clerk of the Court at the address listed below, and postmarked no later than February 8, 1994. Attendance at the hearing on the Settlement is not necessary, but any class member wishing to be heard orally at the hearing should notify the Clerk at the address below no later than February 8, 1994....

APPENDIX L

28 U.S.C. §1651, WRITS

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary to the usages and principles of law.

(3) (2)

Nos. 93-860 and 93-1035

Supreme Court, U.S.
FILED
JAN 28 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1993

SHIRLEY IVY, Individually and as Representative of the Estate of Donald Ivy, deceased, et al.,
PETITIONERS,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, ET AL.,
RESPONDENTS.

RONALD L. HARTMAN, ET AL.,
PETITIONERS,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, ET AL.
RESPONDENTS.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Steven Brock
RIVKIN, RADLER & KREMER
EAB Plaza
Uniondale, N.Y. 11556
(516) 357-3000

John C. Sabetta*
LORD DAY & LORD,
BARRETT SMITH
1675 Broadway
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* *Counsel of Record*

43 pp

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101 Park Avenue
New York, N.Y. 10178
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Michael M. Gordon
Ralph A. Berman
CADWALADER, WICKERSHAM & TAFT
100 Maiden Lane
New York, N.Y. 10038
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Henry G. Miller
Morton B. Silberman
CLARK, GAGLIARDI & MILLER
The Inns of Court
99 Court Street
White Plains, N.Y. 10601
(914) 946-8900

Myron Kalish
SHEA & GOULD
1251 Avenue of the Americas
New York, N.Y. 10020
(212) 827-3000

QUESTIONS PRESENTED

Petitioners are veterans who claim that they were injured by exposure to the herbicide Agent Orange while serving in the Vietnam War. They were parties to a class action in federal district court that was settled in 1984 by the creation of a $180 million fund against which they are eligible to assert claims. The order implementing the settlement enjoins petitioners and other class members from undertaking further litigation against the defendants in any court based on exposure to Agent Orange in Vietnam. In clear violation of this order, petitioners brought suit against defendants in Texas state court. Rather than hold petitioners in contempt or enjoin the state proceeding, the federal district court administering the settlement agreement accepted removal of petitioners' suit to federal court and itself adjudicated petitioners' attack on the settlement. The questions presented are:

1. Whether state court suits brought by disgruntled parties to a federal class action, which could be enjoined by the federal court to protect the integrity of the federal judgment and the settlement fund being administered by the court, may instead be removed pursuant to the All Writs Act, 28 U.S.C. § 1651.

2. Whether petitioners were properly included within the plaintiff class in the federal class action.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.1 of the Supreme Court Rules, respondents hereby state:

1. *Diamond Shamrock Chemicals Company*. On September 4, 1986, all the outstanding stock of Diamond Shamrock Chemicals Company ("DSCC") was sold to Oxy-Diamond Alkali Corporation, a company under the ownership of Occidental Petroleum Corporation. DSCC (renamed Occidental Electrochemicals Corporation) was subsequently merged into Occidental Chemical Corporation, an indirect, wholly-owned subsidiary of Occidental Petroleum Corporation, which is publicly traded on the New York Stock Exchange.

2. *The Dow Chemical Company*. The Dow Chemical Company is a publicly traded corporation that has the following publicly traded subsidiaries and affiliates:

Marion Merrell Dow, Inc.
Destec Energy, Inc.

3. *Hercules Incorporated*. Hercules Incorporated is a publicly held corporation whose shares are traded on the New York Stock Exchange. It has no parent or subsidiary company required to be listed herein.

4. *Monsanto Company*. Monsanto Company has no publicly owned parent company or affiliates. The following Monsanto Company subsidiaries have issued shares to the public:

Southwall Technologies, Inc.
The Macneal-Schwendler Corp.
Micro General Corp.
Dura Pharmaceutical
Gensia Pharmaceuticals
Microfluidics

5. *T.H. Agriculture & Nutrition Co., Inc.* T.H. Agriculture & Nutrition Co., Inc. is a wholly-owned subsidiary of Philips Electronics North America Corporation, formerly known as North American Philips Corporation. Philips Electronics North America Corporation is an indirect wholly-owned subsidiary of Philips Electronics N.V., a publicly held corporation based in The Netherlands.

6. *Uniroyal, Inc.* Prior to the commencement of the above-captioned actions, Uniroyal, Inc. was a publicly held company. During the course of these actions the shares of Uniroyal, Inc. were acquired by CDU Holding, Inc. and Uniroyal was liquidated. CDU Holding, Inc. has no subsidiaries.

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COUNTERSTATEMENT OF THE CASE

The long and complex history of the *Agent Orange* litigation is reflected in part by the ten previous unsuccessful certiorari petitions filed in the case.[1] Accounts of various phases of the litigation are in print. See, *e.g.*, Pet. App. A28-A33 (citing some of the "hundreds of published and unpublished decisions" rendered in the litigation).[2] The following statement focuses on the facts pertinent to petitioners' current claims. Petitioners' account of the relevant facts is distorted and misleading.

A. The *Agent Orange* Class Action

In 1978, Vietnam veterans and family members began filing individual and representative actions in federal and state courts around the country against respondents, manufacturers of the herbicide Agent Orange, for injuries allegedly caused by the veterans' exposure to Agent Orange in Vietnam. Ultimately some 600 suits, involving 15,000 named plaintiffs resident in virtually every state of the nation and several foreign countries, were

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[1] See *Dow Chemical Co. v. Brown*, petition for cert. filed, 61 U.S.L.W. 3195 (U.S. Sept. 22, 1992) (No. 92-438) (remand of civilians' *Agent Orange* claims unreviewable), cert. denied, 113 S. Ct. 599 (1992); *In Re "Agent Orange" Product Liability Litig. ("Agent Orange")*, 818 F.2d 145 (2d Cir. 1987) (approving certification and settlement of the class action), cert. denied, 484 U.S. 1004 (1988); *Agent Orange*, 818 F.2d 179 (2d Cir. 1987) (approving plan for distributing settlement fund), cert. denied, 487 U.S. 1234 (1988); *Agent Orange*, 818 F.2d 187 (2d Cir. 1987) (affirming dismissal of opt-out claims), cert. denied, 487 U.S. 1234 (1988); *Agent Orange*, 818 F.2d 201 (2d Cir. 1987) (affirming dismissal of direct claims against the United States), cert. denied, 484 U.S. 1004 (1988); *Agent Orange*, 818 F.2d 210 (2d Cir. 1987) (affirming dismissal of Agent Orange claims of certain civilians), cert. denied, 484 U.S. 1004 (1988); *Agent Orange*, 818 F.2d 216 (2d Cir. 1987) (overturning fee arrangement among plaintiffs' counsel), cert. denied, 484 U.S. 926 (1988); *Agent Orange*, 821 F.2d 139 (2d Cir.) (affirming order unsealing confidential pretrial discovery materials), cert. denied, 484 U.S. 953 (1987); *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858 (2d Cir.) (denying mandamus seeking to vacate class certification), cert. denied, 465 U.S. 1067 (1984); *Agent Orange*, 635 F.2d 987 (2d Cir. 1980) (reversing finding of federal question jurisdiction), cert. denied, 454 U.S. 1128 (1981).

[2] "Pet. App." refers to the appendix to the certiorari petition in No. 93-860. "ASA" refers to the Supplemental Appendix filed by respondents as appellees in the court of appeals.

transferred by the Panel on Multidistrict Litigation to the Eastern District of New York for coordinated and consolidated pretrial proceedings. *In re "Agent Orange" Product Liability Litigation*, MDL No. 381.

The transferee court's ruling that plaintiffs' claims arose under federal common law and that the court accordingly had federal question jurisdiction was reversed by a divided panel of the court of appeals, 635 F.2d 987 (2d Cir. 1980), cert. denied, 454 U.S. 1128 (1981), and the litigation thereafter proceeded on the basis of diversity jurisdiction. 506 F. Supp. 762 (E.D.N.Y. 1980).

1. Class Certification And Settlement

Plaintiffs argued from the outset for a broad class, contending that *all* Vietnam veterans had been exposed to Agent Orange and had thereby suffered an "injury" compensable under the law of torts. See Pet. App. A13. Thus, the amended complaints filed in the lead action claimed that the action was brought on behalf of 2.4 million veterans who had served in Vietnam, all of whom allegedly had been exposed and injured, including "those individual veterans manifesting no symptoms of illness and disease at present, but at risk of genetic and somatic damage." ASA 1, 19-20.

Defendants opposed class certification and moved to dismiss the so-called "at risk" or "after-manifested" claims. Plaintiffs defeated the motion, arguing successfully in both the district court and Second Circuit (see 635 F.2d at 992-93 n.10) that "[n]ot all courts adhere to the rule that an injury and damage are not compensable simply because they are not presently and immediately observable." ASA 350.

In December 1980 the district court determined to certify a plaintiff class in the lead action under Fed. R. Civ. P. 23(b)(3). The court proposed to define the class as

> persons who claim injury from exposure to Agent Orange and their spouses, children and parents who claim direct or derivative injury therefrom.

506 F. Supp. at 788. This was, in the court's view, "the broadest possible class" (*ibid.*), one that included "over two million Vietnam

veterans and their families." *Id.* at 791. However, no certification order issued at the time.

In December 1983, after extensive discovery and motions and over defendants' objection, the district court formally certified a Rule 23(b)(3) "common question" class with opt-out rights to address the common issues of general causation and the military contractor defense. Adhering to its intent to define the class broadly, the court modified the language of the definition so that the class consisted of

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange. * * * The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

100 F.R.D. 718, 729 (E.D.N.Y. 1983). The phrase "persons * * * who were injured" was chosen in response to defendants' objection that the earlier definition ("persons who claim injury") lacked an objective standard. See ASA 403-05; 100 F.R.D. at 728-29.

The district court ordered plaintiffs' counsel to notify class members of the certification and the right to opt out -- by mail where feasible, and also by radio, television, magazine and newspaper announcements in this country, Australia and New Zealand. 100 F.R.D. at 729-31. The court of appeals denied defendants' mandamus petition to vacate the class certification and notice plan, and this Court declined review. 725 F.2d 858 (2d Cir.), cert. denied, 465 U.S. 1067 (1984).

On May 7, 1984, the day the trial was to begin, the parties reached a tentative settlement. The Settlement Agreement provided for the establishment of a $180 million settlement fund to cover all claims arising then or in the future out of veterans' exposure to Agent Orange in Vietnam, and provided that class members' exclusive remedy against defendants was a claim against the fund. The Settlement Agreement made clear that "[t]he [c]lass specifically includes persons who have not yet manifested injury" (597 F.

Supp. 740, 865 (E.D.N.Y. 1984)), and it permanently barred class members from instituting or maintaining any action against defendants based on exposure to Agent Orange. A reserve of $10 million out of the $180 million was created to indemnify the defendants from any state court judgments obtained by "opt-out" class members. Any part of the reserve not used reverts to the benefit of the class members. 611 F. Supp. 1396, 1437 (E.D.N.Y. 1985).

A settlement notice was directed to class members, some of whom objected to the settlement and moved for certification of a sub-class of objectors. The objectors argued in part that the proposed settlement improperly broadened the class definition to include "after-manifested" or "at risk" claimants. ASA 642-66; 899-902. The district court denied the objectors' motion, finding that "[n]o purpose would have been served by appointing counsel for a subclass of disappointed claimants." 597 F. Supp. at 757; see also ASA 729-33 ("I defined the class in my class action opinion and then notice went out on that class as then defined. * * * I believe the original language properly interpreted included after manifestations.").

After extensive, nationwide fairness hearings, the district court granted final approval to the Settlement Agreement in June 1985 (611 F. Supp. 1296, 1347 (E.D.N.Y. 1985)), having found that the weaknesses in plaintiffs' case and the strength of defendants' defenses were decisive factors. See 597 F. Supp. 740 (E.D.N.Y. 1984). On July 9, 1985, the court entered an Order and Final Judgment of Dismissal, which directed consummation of the settlement "in accordance with its terms," and (1) dismissed with prejudice all claims by class members; (2) barred all class members from instituting or maintaining any action against defendants arising out of the subject matter of any of the class action complaints; and (3) retained jurisdiction over the class action for the purpose of maintaining, administering and distributing the settlement fund. See 618 F. Supp. 623, 624 (E.D.N.Y. 1985). Under the distribution plan adopted by the court, 75% of the $180 million settlement fund is to be paid to class members for nontraumatic death or total disability of class member veterans who were exposed to Agent Orange, with most of the remainder allocated to

a class assistance program to fund projects and services of benefit to the entire class.

2. *The Second Circuit Affirms The Class Certification and Settlement*

Appeals were taken from various rulings and the final judgment of the district court. Specifically assigned as errors were the certification of the class, the inclusion in the class definition of persons with "after-manifested" injuries, the adequacy of notice, the adequacy of the representation given the absent class plaintiffs and the fairness of the settlement. The court of appeals affirmed the certification and ensuing settlement of the class action in all relevant respects. 818 F.2d 145 (2d Cir. 1987). This Court denied multiple petitions for certiorari. 484 U.S. 1004 (1988).

The Second Circuit upheld certification of a Rule 23(b)(3) class because of the centrality of one major issue -- the military contractor defense. 818 F.2d at 166. It agreed with the district court that the interests of all class members, regardless of the nature of their claims, were identical with regard to the facts and law relevant to that potentially dispositive defense, *id.* at 166-69, and that class members with actual notice would adequately have represented class members unaware of the action. *Id.* at 167-69.

In affirming the adequacy of notice, the Second Circuit held that the district court's notice plan was a "creative approach appropriate to this unique case." 818 F.2d at 167. The court rejected the argument that all 2.4 million class members should have been sent letter notice, stating that "far fewer than that number were exposed to Agent Orange" and that "many of the members of the class were unknown and could not be located through reasonable efforts." *Id.* at 169. The court took judicial notice of the widespread publicity the litigation had received and concluded that "no practical problem exists as to the adequacy of the notice." *Ibid.*

Finally, the Second Circuit approved the settlement as fair in light of the pervasive factual and legal difficulties faced by the plaintiffs in establishing causation and exposure to Agent Orange and in avoiding the statute of limitations (818 F.2d at 172-173), as

well as the court's "conviction that the military contractor defense absolved the [defendants] of any liability." *Id.* at 151.

After this Court denied certiorari, the payment program and class assistance program began making disbursements and grants; by then, the settlement fund had grown (with interest) to $240 million. As of January 1994, the payment program has paid more than 38,000 claims and disbursed more than $164 million to disabled veterans and their survivors. Letter from Special Master Deborah E. Greenspan to Judge Jack B. Weinstein (Jan. 14, 1994) ("Special Master's Letter"). *More than 55% of all disability claims paid by the fund were for disabilities with onset after May 7, 1984; and more than 61% of all survivor claims paid by the fund were for deaths occurring after May 7, 1984.* Indeed, two of the named plaintiffs in the *Ivy* case, who are petitioners herein, filed claims against the fund and received benefits in 1991. See Pet. App. A44-A45. In addition, through November 1993, the class assistance program had awarded over $40 million in grant funds, benefiting more than 148,000 veterans and family members nationwide. Fifth Annual Report of the Agent Orange Class Assistance Program (Nov. 1993), at pp. 1, 10.

B. *Ivy* and *Hartman*

The two cases now before the Court were begun in Texas state court in 1989 and 1990. Claiming to represent a class of those similarly situated, petitioners alleged that their injuries from exposure to Agent Orange had manifested themselves or been discovered only after the deadline to opt-out of the *Agent Orange* class and that they therefore were not members of that class and were not bound by the class action dismissal order. Purporting to rely solely on state law, petitioners sought compensatory and punitive damages from defendants and the creation of a fund to monitor the health of all Agent Orange-exposed Vietnam veterans and their family members for the next 20 years. ASA 760, 776-77, 791, 805.

Defendants removed the lawsuits to federal court on federal question grounds (claiming "artful pleading" and "complete federal preemption"), and the actions were transferred by the Judicial Panel on Multidistrict Litigation to the Eastern District of New York. In January 1990 the *Ivy* plaintiffs petitioned the Second Circuit for a

writ of mandamus directing the MDL Panel to vacate the transfer order for lack of federal subject matter jurisdiction. The court of appeals denied the petition, ruling that subject matter jurisdiction should be decided in the first instance by the transferee court. *In re Ivy*, 901 F.2d 7 (2d Cir. 1990).

In October 1990 plaintiffs moved to remand their actions to Texas state court. In December 1990 defendants moved under the All Writs Act for an order permanently enjoining petitioners from prosecuting these actions because petitioners were members of the *Agent Orange* class and therefore were bound by the anti-litigation provision of the district court's order approving the Settlement Agreement. Defendants also moved to dismiss petitioners' claims and for other relief.

1. Dismissal By The District Court

The district court ruled in October 1991 that it did have subject matter jurisdiction of petitioners' claims, and it denied petitioners' motion to remand and granted defendants' motion to dismiss. Pet. App. A47-A56. The court first held that petitioners "are members of the *Agent Orange* class." *Id.* at A49. It observed that, in approving the class certification and settlement, both it and the court of appeals had previously ruled that the class definition included persons with "after-manifested" injuries. The court rejected petitioners' assertion that after-manifested claimants could not properly have been included in the class because of inadequate notice and representation. *Id.* at A54.

Having determined that petitioners were members of the *Agent Orange* class, the district court went on to conclude that petitioners' new lawsuits violated the injunction against such litigation contained in the class action final judgment; that the suits constituted a "direct threat to the continuing viability of the judgment settling the class action"; and that, if successful, the suits would "automatically reduce the sums available for other class members." Pet. App. A42, A49-A52, A55. Petitioners' claims, the court observed, "are a challenge to the integrity of the Settlement Agreement and the authority of this court." *Id.* at A51.

In these circumstances, the district court held that it had "the power and the obligation to protect and effectuate its orders and

final judgments in the *Agent Orange* litigation." Pet. App. A51. The court noted that if the *Ivy* and *Hartman* cases had remained in state court, it would have had authority under the All Writs Act to enjoin any state court proceedings inconsistent with the court's prior orders. *Id.* at A55. Taking jurisdiction of the cases after they were voluntarily removed was a "less drastic, and therefore preferable result." *Ibid.* (quoting *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 864 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989)). In view of the foregoing, the court said that it "need not address defendants' motion for a permanent injunction." Pet. App. A56.

2. *The Second Circuit Affirms The Dismissal*

The Second Circuit affirmed the dismissal of petitioners' complaints, holding that it was "crystal clear" (Pet. App. A10) that the district court had certified a class in 1984 that included veterans who had been exposed to Agent Orange but had not yet manifested injury.

> There * * * can be no question concerning the district court's intent or that of the parties to the Settlement Agreement. 'At risk' veterans, i.e., victims with no visible symptoms, were included in the plaintiff class.

Id. at A14. Indeed, the court of appeals noted that, "[f]rom the very outset of the litigation in *Agent Orange I*, the plaintiffs adopted this meaning and urged it repeatedly upon the district court" (*id.* at A13), and that it had recognized the propriety of including "at-risk" veterans in its 1987 opinion affirming the class settlement. The Second Circuit rejected petitioners' current arguments against class membership as "no stronger now than they were when made in 1987." *Id.* at A14.

The court of appeals also ruled that, given "the 'exceptional circumstances' surrounding the instant case," and the need "'to protect or effectuate' the district court's *Agent Orange I* judgment," removal of petitioners' suits to federal court was a proper use of federal judicial power under the All Writs Act. Pet. App. A8-A10. The court stated that "[i]f Agent Orange victims were allowed to maintain separate actions in state court, the deleterious effect on the

Agent Orange I settlement mechanism would be substantial" and that the parties to the settlement -- including petitioners -- "implicitly recognized this when they agreed that all future suits by class members would be permanently barred." *Ibid.*

Finally, the Second Circuit rejected petitioners' attack on the class notice, stating that it had held that the notices were adequate in its opinion approving the settlement and that its "view has not changed." Pet. App. A16. The court of appeals also rejected plaintiffs' claims of inadequate representation, noting that petitioners "do not challenge the qualifications of the *Agent Orange I* class counsel" and that "their conflict-of-interest claims are unpersuasive." *Id.* at A17. The court explained that it would ordinarily have considered the appointment of a guardian to represent the interests of absent claimants with questionable injuries, but that such additional protections were unnecessary here given the

> unique circumstances surrounding *Agent Orange I* -- in particular, the even-handed treatment of both identified and unidentified legitimate claimants in the *Agent Orange I* settlement and the dim prospects of success both then and now * * *.

Id. at A21. In sum, the court concluded that the "fundamental fairness of the *Agent Orange I* settlement remains unshaken" and that the chances of recovery by Agent Orange plaintiffs "are nearly as speculative today as they were at the time of settlement." *Ibid.*

ARGUMENT

Petitioners' counsel, presumably aware that this case is driven by a unique set of facts and involves no issue on which the lower courts disagree, have presented questions that vastly distort and overstate what the court of appeals actually held. Contrary to the implicit premise of the first question stated in each petition, the Second Circuit did not confer broad discretion on federal judges to invoke the All Writs Act to remove otherwise unremovable cases from state court whenever they perceive a need to do so. As for the questions related to the merits of the inclusion of petitioners in the *Agent Orange* class (question 2 in *Ivy* and questions 4-5 in *Hartman*), the briefest comparison of petitioners' highly slanted

formulations to the Second Circuit's actual ruling readily shows that the case does not present the issues posed by petitioners. The gross distortions embodied in the formulation of the questions presented eloquently testify to the unsuitability of these cases for this Court's review.

Similarly, petitioners' arguments gloss over several critical factors that demonstrate the uniqueness and narrowness of the Second Circuit's decision. Petitioners barely mention that it was an indispensable ingredient of the global settlement of the *Agent Orange* class action that the settlement, which required defendants to create a $180 million fund to benefit class members, would mark an end to *all* litigation by Vietnam veterans and their families of claims arising from exposure to Agent Orange. To this end, in approving the final settlement, the district court entered an order barring class members from filing suit in the future in any court seeking remedies from defendants for injuries allegedly caused by exposure to Agent Orange during the Vietnam War.

Petitioners bury in a footnote their concession that they are members of the plaintiff class that entered into this settlement. Ivy Pet. 7 n.8. They do not mention that many thousands of the claimants whom petitioners purport to represent -- including two of the named petitioners -- have already claimed and received benefits from the settlement fund. Nevertheless, in clear violation of the federal court order implementing the settlement, petitioners brought these class actions in Texas state court seeking to hold defendants liable for injuries suffered as a result of exposure to Agent Orange in Vietnam. Rather than holding petitioners in contempt or enjoining the state court proceedings, as it could have done, the district court took the far less intrusive step of accepting removal of the cases to federal court and adjudicating petitioners' numerous attacks on the settlement.

The district court's actions unquestionably were correct in the unique circumstances of this case, do not conflict with the decision of any other court, and raise no legal issue warranting further review. This Court has held that a district court has authority under the All Writs Act to "effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *New York Tel. Co.*, 434 U.S.

159, 172 (1977). As the Second Circuit explained (Pet. App. A9) (emphasis added):

> Given the "exceptional circumstances" surrounding the instant case, issuance [of the writ] was a proper exercise of judicial discretion. The district court was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings; *it was enforcing an explicit, ongoing order against relitigation of matters it already had decided, and guarding the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction.*

The Second Circuit also correctly rejected petitioners' challenges to the wording of the class notice and to the adequacy of their representation by class counsel. In finding the notice sufficient and the representation adequate, the court of appeals relied, among other things, on the fact that persons with before-manifested and those with after-manifested injuries were identically situated with respect to the military contractor defense, and that the settlement fund conferred equal benefits on both groups.

In sum, contrary to petitioners' rhetoric, the courts below did not employ the All Writs Act as an independent and free-wheeling basis for federal jurisdiction (which already existed with respect to these petitioners by virtue of their membership in the class) and did not countenance class action procedures that raise any legal question of importance beyond the specific facts of this case. If petitioners were permitted to bring collateral attacks on the *Agent Orange* settlement in state court, it would render worthless the "anti-litigation" provisions of the Settlement Agreement, to which petitioners were parties, and would jeopardize the continued validity of the entire settlement, pursuant to which some $164 million has already been expended for the benefit of class members. The courts below acted responsibly, and well within their authority, in preserving the integrity of this decade-old federal court judgment.

I. THE DISTRICT COURT APPLIED SETTLED PRINCIPLES GOVERNING THE ALL WRITS ACT TO GRANT A REMEDY APPROPRIATE TO THE EXCEPTIONAL FACTUAL CIRCUMSTANCES OF THIS CASE

Petitioners assert that the Second Circuit has radically "transform[ed] the All Writs Act into a general grant of federal jurisdiction," giving federal district judges unbridled discretion to remove unremovable cases from state courts "when the need arises." Ivy Pet. 2. In fact, the Second Circuit has simply followed this Court's settled precedents that a federal court has the power under the All Writs Act[3] in "exceptional circumstances" to issue such writs as may be "necessary or appropriate" to "effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *New York Telephone Co.*, 434 U.S. at 172. Compare petitioners' overblown and deceptive assertions with the actual statements of the Second Circuit:

PETITIONERS' ASSERTIONS	SECOND CIRCUIT OPINION
In the words of the Second Circuit, the All Writs Act permits district judges "to remove an otherwise unremovable state court case" in the discretion of the district judge, "when the need arises." **A8-A9**. Ivy Pet. 2.	A district court, *in exceptional circumstances*, may use its All Writs authority to remove an otherwise unremovable state court case in order to "effectuate and prevent the frustration of orders it has previously issued *in its exercise of jurisdiction otherwise obtained.*" *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977).
[T]he [Second Circuit] made clear that district judges are free to resort to All Writs	

[3] The All Writs Act grants federal courts the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

removal in the "exercise of judicial discretion" whenever they believe "'the need arises.'" **A9**.

Ivy Pet. 21.

[A]ccording to the Second Circuit, [the All Writs] Act provides an independent source of authority for subject-matter jurisdiction on removal.

Ivy Pet. 15.

Pet. App. A8 (emphasis added).

In so holding, we are not unmindful of the fact that the All Writs Act is not a jurisdictional blank check which district courts may use whenever they deem it advisable. "Although that Act empowers federal courts to fashion *extraordinary remedies when the need arises*, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985). Given the "exceptional circumstances" surrounding the instant case, issuance was a proper exercise of judicial discretion.

Pet. App. A9 (emphasis added).

Thus, the Second Circuit did not announce "a radical new removal doctrine." Ivy Pet. 2. Rather, it carefully applied this Court's decisions construing the All Writs Act to the exceptional factual circumstances of this case. In approving use of the Act, the court of appeals emphasized that this case involved:

- Ongoing federal proceedings implementing a federal class action settlement;

- A federal court order barring class members from filing state court actions;
- Petitioners' blatant violation of that order, resulting in
- A direct threat to the viability of the ongoing federal proceedings and the continued administration of the settlement fund.

Pet. App. A9-A10. Once the Second Circuit's decision is accurately stated, it is apparent that that decision is plainly correct and completely in accord with the decisions of this Court and the other courts of appeals. Review of this unique case would provide little guidance to courts in future cases. In such circumstances, this Court should not rush to consider petitioners' distorted version of the removal and All Writs Act issues.

A. There Is No Conflict Among The Circuits

It is highly revealing that petitioners relegate to a footnote their assertion (Ivy Pet. 11 & n.14) that the Second Circuit's decision conflicts with cases from the Fifth, Ninth, and Tenth Circuits. There is no conflict whatsoever. Both the decision below and the allegedly conflicting cases follow this Court's long-settled rule that the All Writs Act permits federal courts to issue writs "necessary or appropriate" in aid of "jurisdiction otherwise obtained" but does not itself grant original federal jurisdiction.[4] *New York Telephone*, 434 U.S. at 172. None of these cases criticizes any of the others, and there is no underlying disagreement in principle, even in *dicta*.

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[4] Many of the cases cited by petitioners do not involve removal at all and merely restate this general rule. See *Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1971), cert. denied, 406 U.S. 945 (1972) (All Writs Act "does not confer original jurisdiction, but rather, prescribes the scope of relief that may be granted when jurisdiction otherwise exists"); *Brittingham v. U.S. Comm'r of Internal Revenue*, 451 F.2d 315, 317 (5th Cir. 1971) (All Writs Act empowers federal courts "to issue writs in aid of jurisdiction previously acquired on some other independent ground"); *Commercial Security Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1355 (10th Cir. 1972) (All Writs Act "does not operate to confer jurisdiction; ancillary jurisdiction is provided where jurisdiction is otherwise already lodged in the court").

The only two circuits that have considered removal in the context of the All Writs Act, the Second and the Ninth, are in accord. Both circuits assume that removal is one of the remedies potentially available under the Act in an appropriate case. Both circuits recognize *New York Telephone* as controlling authority and simply apply it to the facts presented. See Pet. App. A8-A9 (citing *New York Telephone*); *Westinghouse Electric Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 937 (9th Cir. 1993) (same); *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989) (same). See also *United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992).

Under *New York Telephone*, the courts must determine whether removal is "necessary or appropriate" to "effectuate and prevent the frustration of orders [a federal court] has previously issued in its exercise of jurisdiction otherwise obtained." 434 U.S. at 172. In this case, the district court "otherwise obtained" jurisdiction over the parties and the subject matter based on its continuing jurisdiction of the *Agent Orange* class action. See Pet. App. A49-A51. (It bears repeating that petitioners do not challenge the conclusion of both lower courts that they are members of the *Agent Orange* class. Ivy Pet. 7 n.8). Finding that the present suits were "a direct threat" to its orders in ongoing federal proceedings, the court accepted removal under the All Writs Act to "effectuate and prevent the frustration" of the Settlement Agreement and to enforce its order barring relitigation of *Agent Orange* claims by class members. Pet. App. A54-A55. The Second Circuit agreed, holding that the district court properly invoked the All Writs Act to "guard[ ] the integrity of its rulings in complex multidistrict litigation *over which it had retained jurisdiction.*" *Id.* at A9 (emphasis added).

In *Westinghouse Electric*, by contrast, the Ninth Circuit determined that the particular state court proceedings at issue would *not* in fact interfere with "the interpretation or the enforcement" of a prior federal protective order. 992 F.2d at 937. Based on that factual determination, it denied removal under the All Writs Act, applying the same *New York Telephone* standard that the Second Circuit employed in this case.

In sum, petitioners' lengthy academic discussion (Ivy Pet. 11-23) of the history of removal statutes and the All Writs Act is wholly beside the point. The Second Circuit did *not* grant "permission to remove cases whenever district judges find 'exceptional circumstances'" (Ivy Pet. 19) and it did *not* ignore the fundamental principle that "only Congress's jurisdictional statutes can authorize jurisdiction in a case" (*id.* at 11). The court of appeals explicitly held that "Judge Weinstein has continuing jurisdiction over the *Agent Orange I* class action, not only to administer the settlement fund, but also to ensure that the Settlement Agreement as a whole is enforced according to its terms." Pet. App. A10 (citations omitted). Petitioners do not take issue with this conclusion. On the facts of this case, no circuit would have reached a contrary result.

B. The District Court Had Power Under The All Writs Act "To Effectuate And Prevent The Frustration" Of Its Orders Barring *Agent Orange* Class Members From Filing Actions In State Courts

Petitioners argue (Ivy Pet. 23; Hartman Pet. 47) that, "at minimum, review should be granted * * * to clarify the boundary of lower courts' authority under the All Writs Act." There is no merit in that suggestion. The All Writs Act gives a federal court the power to issue "appropriate" writs "to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *New York Telephone*, 434 U.S. at 172. That is precisely what the district court did here.

1. Jurisdiction was "otherwise obtained" in this case as ancillary to the district court's "continuing jurisdiction" over the Agent Orange *class action.*

It is well-settled that federal courts have ancillary jurisdiction to enforce their orders and judgments, including injunctive orders and decrees.[5] As noted above, the district court had "continuing

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[5] See, *e.g.*, *Finley v. United States*, 490 U.S. 545, 551 (1989) (ancillary jurisdiction may be asserted even over non-parties "when necessary to give effect to the court's judgment"); *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524 (1986) (Congress amended Anti-Injunction Act to permit courts to issue injunctions to "protect or effectuate its judgments," codifying Justice Reed's

jurisdiction" over the *Agent Orange* class action and thus had ancillary jurisdiction to enforce its orders implementing the Settlement Agreement. Pet. App. A10, A49-51.

From the defendants' perspective, the most important consideration in agreeing to settle this action, despite their strong defenses, was the assurance that *Agent Orange* litigation by Vietnam veterans would be brought to an end. That assurance was guaranteed in two ways: the fact that the *Agent Orange* class included veterans with after-manifested symptoms, and the provisions of the Settlement Agreement and district court order that barred new actions brought by members of the class. In providing that "[t]he Settlement Agreement shall be consummated in accordance with its terms," the district court specifically ordered that every member of the class "is hereby forever barred from instituting or maintaining any action against any of the defendants * * * arising out of or relating to, or *in the future arising* out of or relating to, the subject matter of * * * this class action." 618 F. Supp. at 624-25 (emphasis added). The district court found that petitioners had violated this injunction, which was expressly directed against persons who might thereafter assert claims based on after-manifested injury ("in the future arising"). See Pet. App. A51, A52.

Thus, as both courts below held, the district court had jurisdiction to enforce its injunction against relitigation by class members, in addition to its general retained jurisdiction to enforce the Settlement Agreement and administer the settlement fund. Pet. App. A10, A21, A51-52. Petitioners, who concede that they are members of the plaintiff class subject to the anti-litigation provisions of the Settlement Agreement, do not take issue with any of these determinations, which are fatal to their legal position.

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dissenting views in *Toucey*, *infra*); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 146 (1941) (Reed, J., dissenting). The principle applies with undiminished force to injunctive orders. See, *e.g.*, *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 452-55 (1932); *In re Debs*, 158 U.S. 564, 594 (1895).

2. *The district court exercised its power under the All Writs Act "to effectuate and prevent the frustration of" its orders.*

By bringing these actions, petitioners "challenge the binding effect of the Settlement Agreement and the order of [the district] court prohibiting new suits by class members." Pet. App. A55. Petitioners "seek to avoid" and "circumvent" the district court's orders and judgment. *Id.* at A49, A42. Petitioners' suits, if successful, "will automatically reduce the sums available for other class members." *Id.* at A42. Based on these findings, the district court determined that petitioners' suits constitute "a direct threat to the continuing viability of the judgment settling the class action." *Id.* at A55. The Second Circuit agreed that "the deleterious effect on the *Agent Orange I* settlement mechanism would be substantial" and concluded that the district court "was enforcing an explicit, ongoing order" and "guarding the integrity of its rulings." *Id.* at A8-A9.

Petitioners take issue with these fact findings, but their arguments are disingenuous. They assert that "[t]heir case manifestly was not * * * a 'challenge[ ]' to the settlement agreement"; rather, they simply "sought to pursue their own suit for money damages, entirely separate from the settlement" (Ivy Pet. 22; Hartman Pet. 41). Nowhere do petitioners acknowledge that, as members of the *Agent Orange* class, they were parties to and beneficiaries of the settlement, much less explain how their actions in bringing suit against defendants can be reconciled with the anti-litigation provisions of the Settlement Agreement. Petitioners also assert (Ivy Pet. 22-23; Hartman Pet. 42 n.35) that "[n]othing about [their] Texas lawsuit affects the operation of the [Settlement] Fund." But defendants entered into the settlement, and agreed to put $180 million into the settlement fund, on the express understanding that they would not be subject to any future litigation brought by members of the *Agent Orange* class. It is by no means clear how the courts would or could unscramble the eggs if that understanding is invalidated at this late date.

3. The district court's remedy was "appropriate" on the facts of this case.

Where, as here, there is federal jurisdiction and a need to protect the integrity of ongoing federal proceedings, this Court interprets the All Writs Act "flexibly" to determine whether the particular remedy employed is "appropriate" on the facts of the particular case. *New York Telephone*, 434 U.S. at 173. Congress specifically amended the All Writs Act in 1948 to confirm the power of the federal courts to issue "appropriate" writs as well as "necessary" writs. *Ibid.* The All Writs Act serves as a "legislatively approved source of procedural instruments designed to achieve the rational ends of law." *Ibid. at 172, quoting Harris v. Nelson*, 394 U.S. 286, 299 (1969) (internal quotation omitted). The court may issue such writs as are "calculated in its sound judgment to achieve the ends of justice entrusted to it." *Ibid., quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

Petitioners ask the Court to look to the analogy of statutes granting removal jurisdiction to determine whether removal is an appropriate remedy under the All Writs Act. Because Congress did not explicitly authorize removal jurisdiction to enforce and prevent the frustration of federal court orders, petitioners contend that federal courts are powerless to order removal as a remedy, even if removal is otherwise appropriate. Petitioners' contention runs flatly contrary to the Court's entire body of All Writs Act jurisprudence. While removal *jurisdiction* is determined in accordance with the removal statutes, the appropriateness of removal *as a remedy* where jurisdiction is "otherwise obtained" is determined under the Act. The whole point of the All Writs Act is to provide federal courts with remedies not otherwise specifically authorized by Congress. Congress plainly intended the All Writs Act to give the federal courts acting to enforce their orders broader powers than they would otherwise have, or there would have been no need for the Act.

This Court has repeatedly held that courts have power to enforce their orders and preserve their jurisdiction under the All Writs Act through means that Congress did not explicitly authorize. *New York Telephone, supra; Harris v. Nelson, supra; Federal*

Trade Comm. v. Dean Foods Co., 384 U.S. 597, 608-11 (1966); *Scripps-Howard Radio, Inc. v. Federal Communications Comm.*, 316 U.S. 4, 10-11 (1942). In *New York Telephone*, the Court approved a writ mandating telephone company assistance in the use of pen registers, despite the fact that Congress had authorized such assistance in other statutes governing electronic surveillance but had not done so in the statute governing pen registers. 434 U.S. at 176-78. In *Harris*, Congress had provided by statute for interrogatories in habeas corpus proceedings in some limited circumstances, but not in the circumstances before the Court. The Court nevertheless upheld the lower court's power to order interrogatories under the All Writs Act, as "necessary or appropriate in aid of [its jurisdiction] * * * and agreeable to the usages and principles of law. 28 U.S.C. § 1651." 394 U.S. at 300.

In approving a writ mandating assistance by non-parties in the use of pen registers, the Court in *New York Telephone* relied on a "clear indication by Congress that the pen register is a permissible law enforcement tool." 434 U.S. at 176-78. Similarly, by passing the Anti-Injunction Act, 28 U.S.C. § 2283, Congress has specifically approved the power of federal courts to enforce their orders and to prevent relitigation in state court proceedings of issues that have already been determined in federal court. See *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. at 524. The Second Circuit found that such power was available as an alternative in this case. Pet. App. A10. Under *New York Telephone*, the district court had the power to employ other "appropriate" remedies under the All Writs Act, including the remedy of removal employed in this case, whether or not Congress had specifically authorized such a remedy.[6]

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[6] Petitioners attempt to explain this Court's recent denial of review in *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989), by asserting that any error in ordering removal there was "purely a procedural one" and that "any reversal * * * would merely [have] delay[ed] the ultimate implementation of the district court's remedial orders." Ivy Pet. 24-25 n.32 (quoting *Yonkers* brief in opposition). Petitioners fail to realize that the very same argument could be made in opposition to their effort to obtain review of the removal issue in this case. If this Court were to conclude that the district court improperly accepted removal under the All Writs Act, the district

C. The District Court's Order Is Supported By Principles Of Federalism And Comity

The remedy employed by the district court was particularly "appropriate" when viewed in light of principles of federalism and comity. The courts below gave careful consideration to the need to prevent unnecessary friction between the state and federal courts and fashioned a remedy that sought to accommodate the competing interests.

The district court was faced with petitioners who had flagrantly violated its order barring the filing of new actions in state court and who threatened to prejudice the rights of other class members and defendants under a federal judgment. And, of course, if these petitioners could maintain their actions in Texas state courts, nothing would stop other veterans from bringing similar actions -- producing potentially inconsistent rulings on the preclusive effect of the federal action -- in each of the other 49 States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands. The court concluded that it had the power under the Anti-Injunction Act to enjoin the Texas state court actions as necessary to prevent "rulings inconsistent with the prior federal order." Pet. App. A55. See *Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (3d Cir. 1993). In addition, it considered the possibility of enforcing its order through the contempt power, which also would have made a shambles of the Texas proceedings. *Ibid.* The court ultimately concluded that removal was "the preferred method of enforcement, since it *affords greater comity to state courts* and is less burdensome on the parties than an injunction or contempt citation would be." *Ibid.* (emphasis added).

The court of appeals agreed that the case was properly a matter for the federal rather than the state courts and that the district court had the power to enjoin the state proceedings under the Anti-Injunction Act. Pet. App. A10. As the court below stated in

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court on remand unquestionably could enjoin petitioners from proceeding against defendants in state court. Indeed, the court has held defendants' motion for an injunction in abeyance. Pet. App. A55-A56. Thus, the question that petitioners have presented to this Court will have no bearing on the ultimate outcome of this case.

response to petitioners' argument that the state courts were fully capable of deciding the res judicata effect of a federal judgment:

> The district court was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings; *it was enforcing an explicit, ongoing order against relitigation of matters it had already decided, and guarding the integrity of its rulings in [a] complex multidistrict litigation over which it had retained jurisdiction.*

Id. at A9 (emphasis added). The Second Circuit pointedly remarked that petitioners were advocating not comity, but abdication of the duty of the federal courts to enforce their orders. The court explained that such a result "is not the sort of federal/state comity envisioned" in this Court's precedents since it "would threaten the authority of the federal judicial system and potentially nullify the federal courts' orders and judgments." *Id.* at A11.

Petitioners -- who seek individual advantage at the expense of their fellow class members and who have been found in direct violation of a federal court order -- ask this Court to hold that the federal district court with continuing jurisdiction over the class action is powerless to do anything about it. And they make this astounding argument in the name of federalism and comity! This Court has held that federalism and comity required that a Texas state court judgment be challenged in the Texas state courts, not in the New York federal courts. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). On the facts of this case, neutral application of these principles required that petitioners challenge the orders and injunctions of the New York federal court in the New York federal court, not in Texas state court.

As members of the *Agent Orange* class, petitioners were bound by the Settlement Agreement and the district court's order barring the filing of this suit in state court. They were obligated to obey these orders until such time as the orders might be modified or vacated either by the district court or on appeal. This Court has repeatedly affirmed the "established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are

expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386 (1980).[7]

Had the district court relied on the contempt power to punish petitioners for violating its orders, petitioners' due process objections would not have been a defense. *Walker*, 388 U.S. at 318-21. Had the district court simply enjoined petitioners' state court suit, petitioners' due process objections would not have been heard by any court. Instead, the district court employed the All Writs Act to preserve its authority to enforce its orders and implement the Settlement Agreement, while minimizing any possibility of conflict with the Texas state courts and granting petitioners the opportunity they sought to challenge the court's orders without punishing them for having violated those orders. This accommodation of state and federal interests was surely "appropriate" under the All Writs Act.

Principles of federalism and comity do not require that a federal court stand helpless while its orders are ignored. Petitioners improperly challenged and indeed violated federal court orders. Their challenges belonged in the federal court responsible for enforcing those orders.[8]

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[7] See *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983); *Walker v. City of Birmingham*, 388 U.S. 307, 313-15 (1967). Petitioners were required to move the federal court that issued the order barring filing of state court suits for modification of that order instead of violating the order and seeking to prevent the federal court from enforcing it. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 440 (1976); *United States v. United Mineworkers of America*, 330 U.S. 258, 293-94 (1947).

[8] The brief filed by several states as *amici curiae* proceeds under a material misunderstanding of both the facts of this case and the Second Circuit's narrow decision. Thus, *amici* are simply wrong in their premise that "petitioners' case could [not] have been brought in a federal district court in the first instance." Am. Br. 1. In fact, petitioners' case *was* brought in federal district court, because petitioners were parties to the *Agent Orange* class action in the Eastern District of New York. See Pet. App. A54. Petitioners also could have filed a motion in federal court to be removed from the *Agent Orange* class for due process reasons. Moreover, petitioners violated an express anti-litigation provision of the federal judgment settling the *Agent Orange* case, and their actions threatened to jeopardize the entire *Agent Orange* settlement. *Amici* never mention these inconvenient

II. THE DISTRICT COURT PROPERLY DISMISSED PETITIONERS' CLAIMS AS BARRED BY THE *AGENT ORANGE* CLASS SETTLEMENT

Petitioners also contend, in summary fashion, that the district court erred in dismissing their claims as barred by the Settlement Agreement. See Ivy Pet. 25-30; Hartman Pet. 53-65. Petitioners do not dispute the district court's conclusion that they "are all members of the class barred from instituting new actions against the settling defendants." Pet. App. A51. Instead, they claim that it was improper to include them as part of the *Agent Orange* class. The courts below properly rejected that fact-bound argument on grounds that raise no issues suitable for review by this Court. In so doing, they carefully reviewed and reaffirmed the continuing "fundamental fairness" of the Settlement Agreement. Pet. App. A21; see also *id.* at A19-A21, A56-A59.

Only by disregarding the extensive and complex history of this litigation are petitioners able to assert (Ivy Pet. 28; Hartman Pet. 60) that this case would be an "excellent vehicle for any range of holdings" regarding the management of class actions. In fact, the *Agent Orange* class certification and settlement were approved by the district court and the court of appeals on the basis of unique facts and circumstances unlikely to occur again.

In 1984, when the defendants sought a writ of mandamus to overturn the certification of the *Agent Orange* class, the Second Circuit recognized, in rejecting the petition, that "this action is '*sui generis*, and national in its proportions' involving an extraordinary constellation of facts, parties and pleadings." 725 F.2d at 860 (quotation omitted). Moreover, in 1987, when the court of appeals affirmed the certification of the class and approved the settlement, it once again strongly expressed its skepticism that the class action device was appropriate in mass tort cases. 818 F.2d at 164-66.

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facts, much less explain why it is an "insult to state courts" (Am. Br. 1) for federal courts to enforce their orders and protect their judgments. In sum, the concerns of federalism and comity raised by *amici* are addressed to a hypothetical ruling allowing federal courts to order cases removed from state to federal court whenever they see fit. For reasons stated above, the actual facts of this case bear no resemblance to that hypothetical.

The Second Circuit was willing to allow a class action here only because of the "centrality of the military contractor defense" (*id.* at 166), which was (a) common to the cases of all plaintiffs, including those with "after-manifested injuries," (b) very strong, and (c) potentially dispositive of all of the claims. *Id.* at 167. Indeed, the court stated that "[w]ere this an action by civilians based on exposure to dioxin in the course of civilian affairs, we believe certification of a class action would have been error." *Id.* at 166.

Thus, the *Agent Orange* litigation involved a *sui generis* class action that the court of appeals expressly distinguished from the "typical" mass tort litigation. In such circumstances, it is difficult to imagine a more inappropriate "vehicle" for this Court's review of any aspect of class action procedure, much less the fact-specific questions petitioners present, because "review would be of no importance save to the litigants themselves." *Rudolph v. United States*, 370 U.S. 269, 270 (1962).

Review of this case to decide recurring class action questions also would be inappropriate because the settlement at issue occurred nearly ten years ago. In reliance on the Second Circuit's affirmance of the settlement order and this Court's denial of certiorari in 1988, some $164 million has been disbursed from the settlement fund to over 30,000 class members, including thousands who manifested injury *after* the May 7, 1984 settlement date. Special Master's Letter, *supra*. Petitioners do not even attempt to suggest how at this late date the clock could be turned back to 1984, in the event the class action settlement were to be set aside. Fortunately, however, petitioners' arguments in opposition to the settlement are no more compelling or worthy of review than they were when this Court denied certiorari in 1988.

A. The Settlement Agreement Does Not Discriminate Against Claimants With After-Manifested Injuries

Petitioners contend (Ivy Pet. 26; Hartman Pet. 55-56) that it raises concerns of "basic fairness" to combine plaintiffs with after-manifested injuries in a class with other plaintiffs, because there is an "unavoidable" conflict of interest between the two groups. But petitioners make no effort to explain how this supposed conflict of interest actually affected the Settlement Agreement. Nowhere do

they attempt to rebut the district court's statement that all of the courts that considered the settlement were fully cognizant of the hypothetical conflict and "took steps to minimize the problem in the way they arranged for long-term administration of the Settlement Fund." Pet. App. A57-A58.

The facts also belie petitioners' concerns. As noted above (see page 6, *supra*), more than half of all disability claims paid by the fund were for after-manifested injuries, and more than half of all survivor claims paid by the fund (including claims filed by two of the named petitioners) were for deaths occurring after May 7, 1984. All of these claimants had their claims reviewed, and in appropriate cases received compensation, on a non-discriminatory basis.

Petitioners' attempt to characterize the court of appeals' decision as one that will affect future class action procedure is equally insubstantial. To begin with, as the court below itself noted, this case was atypical and would not be a model even for future cases filed in the Second Circuit. Pet. App. A21. Moreover, in the decade following the *Agent Orange* settlement, other courts, including those noted by petitioners (Ivy Pet. 25 n.33; Hartman Pet. 54 n.43), have opted for the appointment of a trustee to represent the interests of class members who have not yet manifested injury. Thus, not only has the unique *Agent Orange* experience not been followed in subsequent class actions, but this Court will have ample opportunity to consider the issue in a context where its resolution is far more material to the outcome of the litigation.

B. The Inclusion In The *Agent Orange* Class Of Persons Who Had Not Yet Manifested Injury Satisfied The Standing Requirement Of Article III

Petitioners also contend, without elaboration, that under Article III of the Constitution it "may be illegitimate" to include in the *Agent Orange* class "persons who have manifested no perceptible injury" from their exposure to an allegedly harmful substance. Ivy Pet. 26-27; Hartman Pet. 56. Petitioners misunderstand both the application of the standing requirements of Article III to a class

action[9] and the nature of the "injury" necessary to satisfy those requirements.

There is, in fact, no question that a person exposed to a toxic substance, even if not yet manifesting injury and even if only "at risk," has standing under Article III to bring suit. Indeed, in *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73-74 (1978), this Court held that a group claiming future exposure to radiation from a power plant that had not yet been built satisfied the "injury in fact" standard for standing under Article III. Similarly, in *Helling v. McKinney*, 113 S. Ct. 2475 (1993), this Court held that a prisoner subjected to second-hand tobacco smoke, who had sustained no present injury, stated a valid claim under the Eighth Amendment. As a prerequisite to that holding, this Court must have determined that the prisoner had standing to assert such a claim. Thus, a party who has been exposed to a harmful substance has sustained an "injury in fact" and has not asserted a merely "hypothetical" or "abstract" claim.[10] The class in this case was properly defined to include members of the military who were "expos[ed]" to Agent Orange in Vietnam, regardless of when their symptoms first manifested themselves. See Pet. App. A12-A15

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[9] The concept of standing focuses on the party bringing suit. *Flast v. Cohen*, 392 U.S. 83, 99 (1968). At the inception of a class action, the only party before the court is the *named plaintiff*. See *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Petitioners nowhere suggest that the named plaintiffs in the *Agent Orange* class action failed to allege actual injury or lacked standing to act as class representatives. Rather, petitioners focus solely on their own "standing" as absent class members. See Ivy Pet. 26-27; Hartman Pet. 56. Once threshold individual standing by the class representative is met, however, "a proper party to raise a particular issue is before the court, and *there remains no further separate class standing requirement in the constitutional sense.*" 1 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 2.05 at 2-28 (3d ed. 1993) (emphasis added).

[10] Petitioners' reliance (Ivy Pet. 27; Hartman Pet. 57 n.46) on the dissent in *Hoffman-La Roche Inc. v. Sterling*, 493 U.S. 165, 174 (1989), is puzzling. The dissenters in *Hoffman-La Roche* explicitly recognized that a court has power over the parties to a pending case, such as members of the *Agent Orange* class, and questioned only the extension of that power to members of the public at large who were not parties to the action. See *id.* at 177-78.

(holding that "at-risk" veterans suffered a "personal injury" under New York law).

C. The Notice Provided To Members Of The *Agent Orange* Class Comported With Due Process And Cannot Justify Overturning The Class Settlement

Petitioners contend (Ivy Pet. 28-29; Hartman Pet. 62-64) that they were denied their due process rights to adequate representation and notice when they were included in the plaintiff class. Petitioners' fact-bound contentions, however, have already been considered and rejected in two rounds of litigation before the district court and the court of appeals. Furthermore, on two previous occasions, this Court chose not to review any of the issues relating to the district court's certification of a class in the *Agent Orange* litigation. See 484 U.S. 1004 (1988); 465 U.S. 1067 (1984).

Petitioners complain that they did not personally receive notice of the class certification and settlement, or were not in a position to understand the notice if they did receive it. See Ivy Pet. 28; Hartman Pet. 60-62. But the concept of adequate notice does not require that each class member receive actual notice. Rather, notice to absent class members must be the "best *practicable* 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added). In 1987, the court of appeals, in a decision this Court declined to review, considered and expressly rejected the notion that each class member had to receive actual notice, and further held that the absent class members *had* been given the best notice practicable under the circumstances. 818 F.2d at 167-69. The court below reaffirmed those conclusions in this case. Pet. App. A16-17.[11]

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[11] The Hartman petitioners also suggest (Pet. 43-47) that the removal of this case from state to federal court amounted to a denial of the right of collateral attack. However, the court of appeals denied only petitioners' claim that their choice of a Texas forum for their collateral attack was unchallengeable. Pet. App.

In *Battle v. Liberty National Life Insurance Co.*, 770 F. Supp. 1499 (N.D. Ala. 1991), aff'd, 974 F.2d 1279 (11th Cir. 1992), cert. denied, 113 S. Ct. 2999 (1993), a collateral attack in state court was stayed in favor of federal court adjudication to prevent interference with the administration of an ongoing class action settlement. The district court in *Battle* upheld the settlement, noting that because the interests of absent class members were the same as those who received actual notice, "the latter could adequately speak for [absent class members] vis-a-vis the named plaintiffs and class counsel." 770 F. Supp. at 1520. The court also stated, in a conclusion that is directly applicable to this case:

> In closing, the court observes that however substantively disadvantageous the settlement may have been to these movants, there are substantial equities which at this late date fall on the other side of the equation. This court correctly noted in its 1987 injunction order that a complex judgment, constructed after extensive litigation, materially affecting the rights of millions of individuals, and on which all parties have substantially relied for fourteen years, "should not lightly be torn down." Whatever the shortcomings of the notice provided to policyholders by the court in 1977, they are insufficient to justify relief under the constitutional wrecking ball of Rule 60(b)(4).

A11. Petitioners' collateral attack on due process grounds was fully presented and considered anew in the proceedings below. As in any collateral attack, the district court, upon determining that petitioners were properly members of the *Agent Orange* class, enforced the Settlement Agreement and dismissed the claims. Petitioners cannot claim that they were denied the right of collateral attack simply because that attack was unsuccessful. *In re Real Estate Title & Settlement Services Antitrust Litig.*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989), and *Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. granted*, No. 92-1988 (Oct. 4, 1993), both involve special considerations applicable to no-opt-out class actions and are inapposite here. *See Carlough v. Amchem Products Inc., supra* (explaining and distinguishing *In re Real Estate Title* in opt-out class action). Moreover, while the *Agent Orange* Settlement Agreement bars subsequent state court suits by class members, the class action settlement underlying *In re Real Estate Title* and *Brown* did not.

Id. at 1522 (citations omitted).

If a reconsideration of the *Battle* class action could be likened to a wrecking ball, any reconsideration of the *Agent Orange* class action would resemble an earthquake. This Court, were it to accept the arguments advanced by petitioners, could not simply hold that petitioners were improperly included as parties to the Settlement Agreement. Rather, it would be required to void the portion of the Settlement Agreement barring further litigation against the defendants by class members with "after-manifested" injuries, and with it the Agreement itself. Thus, petitioners effectively seek not merely to exclude themselves, belatedly and inequitably, from a settlement entered into nearly a decade ago, but to render that settlement a nullity for the defendants and for the many thousands of class members who have already received or will receive disbursements from the $240 million *Agent Orange* fund.

If petitioners were successful in their challenge, the parties, the district court and the court of appeals could in the years ahead look forward to the Herculean task of determining what to do as a result of the belated, retroactive destruction of the May 1984 settlement. Fortunately, however, petitioners' attempt to destroy the settlement is based on specious arguments that were fully considered and properly rejected many years ago.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 28, 1994

FEB 17 1994

No. 93-1035

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RONALD L. HARTMAN, KATHERINA H. HARTMAN, and as Next Friend to JEFFERY ALAN HARTMAN and ANGELA MARIE HARTMAN, Both minors individually; and LAURA JENKINS, Individually and as Representative of Eddie Jenkins, Deceased; PEGGY SANDS, Individually and as Representative of the Estate of Martin Sands; EMILE ANNIBOLLI; EARL THOMPSON and JUDY L. THOMPSON
Petitioners

v.

DIAMOND SHAMROCK CHEMICALS COMPANY; DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T H AGRICULTURE & NUTRITION COMPANY, INC.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY OF HARTMAN PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY OF HARTMAN PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION

The Hartman Petitioners hereby respond to the Respondents' Brief in Opposition as follows:

I.

Respondents' Brief Overlooks Central Fact That all Petitioners Were Absentee Plaintiffs In the Class Action Which Settled in 1984 ("1984 Class Action")

The Respondents' brief overlooks the central, undisputed fact that all of the Petitioners were absentee plaintiffs in the 1984 class action when it was settled. This undisputed fact has two undeniable consequences:

a. The Yonkers doctrine (Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2nd Cir. 1988) cert. den. 485 U.S. 1077 (1989)), even if a valid doctrine of removal,[1] cannot possibly justify

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[1] We remain steadfast in our view that the Yonkers doctrine is entirely invalid, going far beyond the scope of the removal statutes and laws and being

removal with respect to plaintiffs who were at best only absentee members of a prior, settled class action.[2] and

b. The dismissal was also improper because a class action settlement can never preclude subsequent collateral attacks by absentee members.

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thoroughly contrary to principles of federalism and comity. See pp. 26-43 of the Hartman Petition.

[2] Indeed, it is Petitioners' position that they were not members of the 1984 class action at all, because the class notice described a class composed only of those who were "injured" and did not mention those who were exposed to Agent Orange but had not manifested any injury at the time of the notice and the expiration of the opt-out period. Respondents' repeated statements that Petitioners conceded that they were members of the 1984 class, see pp. 15, 16, 17 18 and 24 of Brief in Opposition, are incorrect. The Hartman Petitioners never conceded that they were members of the 1984 class action, see entire Hartman Petition, but simply focused upon the judicial reality that, even if they were members of such prior class, the fact that they were "absentee" members rendered both the removal and the dismissal wholly improper.

The issues of whether the Yonkers doctrine applies and whether dismissal was proper center upon the same fundamental proposition: the absentee plaintiffs in a class action have the constitutional right to collaterally attack, in a subsequent proceeding, the prior class action settlement. See discussion at pp. 43-47 of Hartman Petition.

The Respondents make an extremely feeble attempt to counter the powerful and irrepressible proposition that this right of collateral attack precludes both the application of the Yonkers doctrine and dismissal on the basis of res judicata. See pp. 28 - 30 of Respondents Opposition Brief.

They first state:

> "The Hartman petitioners also suggest (Pet. 43-47) that the removal of this case from state to federal court amounted to a denial of the right of collateral attack. However, the

> court of appeals denied only petitioner's claim that their choice of a Texas forum for their collateral attack was unchallengeable. Pet. App. A11."

Nte. 11, p. 28, 29 of Resp. Opp. Bf.

The Respondents cite no cases supporting their outrageous implication that, despite plaintiffs constitutional right to launch a collateral attack in a subsequent proceeding in state court, the defendants somehow have the right to force the plaintiffs into federal court through the removal process. The implication is outrageous because the term "collateral" means "in another proceeding, collateral to the original proceeding", and, as noted in Taunton Gardens Co. v. Hill, 557 F.2d 877 (1st Cir. 1977), "the court that certifies a class action 'cannot predetermine the res judicata effect of the (prior) judgment; which can 'be tested only in a subsequent action'".

Thus, the real issue before the Court is not whether the subsequent collateral attack by absentee plaintiffs can be adjudicated in the same court in which the earlier class settlement was consummated, but whether the defendants can force removal to federal court of a "subsequent collateral attack" launched in state court, even though the absentee plaintiffs unquestionably had the right to choose the state court as the forum for their collateral attack.

And the answer to that question is easy. The Respondents concede that the Yonkers doctrine is dependent upon the prior federal court that approved the class action settlement being able, under the All Writs Act, 28 U.S.C. 1651(a), to issue an injunction or similar writ against the state court proceedings. See pp. 16-23, Resp. Opp. Bf.; see also

discussion in our Petition at pp. 45-47; and the discussion in Yonkers, 858 F.2d at 865.

The Respondents, in repeatedly contending that the court below could have issued an injunction against the state court proceeding and thus, under Yonkers, could remove, repeatedly overlooked the fact that the class action collateral attack doctrine precluded the issuance of an injunction in the face of the Anti-Injunction Act.[3]

At bottom is the fact that this Court has never passed upon the validity of the Yonkers doctrine and, for all the reasons expressed in our Petition, we respectfully

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[3] The relitigation exception applies only to those issues actually litigated. Chick Kam Choo v. Exxon, 486 U.S. 140, 147 (1988). The issues pertaining to the collateral attack would not, as noted above, have been properly litigated and predetermined in the 1984 class action suit.

submit that the importance of that issue, and the conflicts among the federal courts in regard to it, suggest the need for certiorari intervention by the Court. But, just as important and deserving of certiorari review, is the issue of whether, if Yonkers is a viable doctrine, removal under it can ever be appropriate with regard to absentee members of a class who want to collaterally attack, in state court, a prior class action settlement in federal court.

And finally, for the same reason that removal under Yonkers was improper - that the Petitioners had the constitutional right to launch a collateral attack in the state court - the dismissal was also clearly improper. Particularly is this true in view of Mr. Hartman's affidavit and the failure by the Respondents, by affidavit or other evidence, to

conclusively negate all potential fact issues inherent under the class action collateral attack doctrine. See Rule 56, F.R.C.P.

Therefore, for all of the above reasons and the reasons stated in the Hartman Petition, Petitioners sincerely believe that this is an important and appropriate case for the granting of certiorari.

The Hartman Petitioners pray as in their Petition.

Respectfully submitted,

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